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IN THREE VOLUMES.

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BY J. H. THOMAS, ESQ.

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A NEW ARRANGEMENT OF THE FIRST INSTITUTE.

BOOK II. OF THE LAW OF TENURES AND REAL PROPERTY.

CHAPTER XXVII. OF ESTATES UPON CONDITION.

LITTLETON, having before spoken of estates absolute, now begins to treat of estates upon condition (A). And a *condition (2)*

Nature of conditions. Glanv. lib. 10. cap. 8. Bracton, lib. 2. ca. 5. §. 7, &c. lib. 4. fol. 212. Brit. cap. 38. & fol. 89. 99. 114. 130. 205. 206. 207. 249. Fleta, lib. 3. cap. 9. & lib. 5. cap. 5. Mirr. cap. 2. sect. 15. & 17.

(A) Estates upon Condition, as Sir William Blackstone justly remarks, are more properly qualifications of other estates, than a distinct species of themselves. Any quantity of interest, either a fee-simple, a freehold, or a term for years, may be granted with an express condition annexed, whereby an estate may be created, enlarged, or defeated upon an uncertain event. Where the condition must be performed before the estate can commence, it is called a *condition precedent*; but where the effect of a condition is either to enlarge or defeat an estate already commenced, it is called a *condition subsequent*. Thus, if an estate be limited to A. upon his marriage with B., the marriage is a precedent condition, and till that happens no estate vests in A. Show. Parl. Ca. 53. Or if a man make a lease of land to I. S. for ten years, provided that if he pay the lessor 10*l.* at Michaelmas, he shall have the land to him and his heirs; this is also a condition precedent, and must be fulfilled ere the estate can take effect. Shep. T. 17. But where a lease is made for years, on condition that the lessee shall pay 10*l.* to the lessor at Michaelmas, or else his lease shall be void, this is a condition subsequent; for here the estate is executed, but the continuance thereof depends upon the breach or performance of the condition. Ibid. So if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent, and that, if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate; in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed. Post, 201 a. Conditions precedent, which are to create an estate, receive a liberal construction: and if the condition is performed as near to the intent as possible it will be sufficient: but it is a rule that conditions which defeat estates are to be constructed strictly. Post, 220 a. Rol. Abr. 438. And such conditions can only be reserved to the feoffor, donor or lessor, and their heirs, and not to a stranger; for it is a maxim of law, as Lord Coke hereafter observes, that nothing which lies in action, entry or re-entry, can be granted over, in order to discourage maintenance and litigation. Post, 214 a. Most of the cases relating to conditions fall under the distinctions of conditions precedent and subsequent.

Besides these express or conventional conditions, there is another class of conditions, which are termed *conditions in law*. Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office generally, without adding other words; the law tacitly annexes hereto a secret condition,

annexed to the realty, whereof Littleton here speaketh, in the legal understanding, *est modus*, a quality annexed by him that hath estate, interest, or right, to the same, whereby an estate, &c. may either be defeated, or enlarged, or created upon an uncertain event. *Conditio dicitur cum quid in casum incertum qui potest tendere ad esse aut non esse confertur.*

LITTLETON. *ESTATES which men have in lands or tenements* (1) *upon condition* are (2) *of two sorts, viz.* (3) *either they have estate upon condition in deed* (*quæ est facti*, that is, upon a condition expressed by the party in legal terms of law), *or upon condition in law* (4), &c.

[Sect. 325.
201 a.]
The different
kinds of con-
ditions.
COKE, 201
a.
(3)*
201 a.
(Flow. 23 a.
1 Bol. Abr.
490. 2 Rep.
79.)

*“Or upon condition in law, &c.” *Quæ est juris*, that is, *tacite*, created by law without any words used by the party. Again Littleton subdivideth conditions in deed (though not in express words) into conditions precedent (of which it is said, *Conditio adimpleri debet priusquam sequatur effectus*;) and conditions subsequent. Again, of conditions in deed some be affirmative, and some in the negative; and some in the affirmative, which imply a negative; some make the estate, whereunto they are annexed, voidable by entry or claim, and some make the estate void *ipso facto*, without entry or claim.

(1) *sur condition* not in L. and M. nor Roh.
(2) *de-en* in L. and M. and Roh.

(3) *ou* not in L. and M. nor Roh.
(4) *Esc.* not in L. and M. nor Roh.

that the grantee shall duly execute his office; on breach of which condition it is lawful for the grantor or his heirs to oust him, and to grant it to another person. Post, 232 b. Upon the same principle proceed all the forfeitures which are given by law of life-estates, and others, for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if a tenant for life or years enfeoff a stranger in fee-simple, this is a forfeiture of their several estates; being a breach of the condition, which the law annexes thereto, viz. that they shall not attempt to create a greater estate than they themselves are entitled to. Post, 215 a. So if any tenant for years, for life, or in fee, commit a felony, the king, or other lord of the fee, is entitled to have their tenements, because their estate is determined by the breach of the condition, that they shall not commit felony, which the law tacitly annexes to every feudal donation.

To the feudal system, indeed, we owe the origin of the doctrine of conditions. In the early ages of the feud, the performance of feudal service was a condition incident to, and inseparable from, the estate of the feudatory; and, in case of failure thereof, the lord had a right of entry for his tenant's forfeiture. And, in after times, when improper feuds were introduced, estates were granted subject to express conditions; and it was a maxim of the feudal law, that *conventio modum dat donationi*: and, therefore, whatever terms the donor prescribed, though varying from the general course, was the rule by which the grant was to be regulated. See Sulliv. Lect. 7. p. 68. Craig. de Jure Feudali, lib. 2. diag. 4. sect. 1, 2, 3.

In the civil law the word condition has a much more extensive signification than in our law; for in the former conditions are defined to be “pactions which regulate that which the contractors have a mind should be done, if a case which they foresee should come to pass.” See Domat. lib. 1. tit. 1. sect. 4. Besides the distinctions of conditions precedent and subsequent, this writer also mentions a third sort of conditions, viz. those which neither accomplish nor dissolve the contract; but which only make some other changes in it: as where it is said, that if a house, which is let be given without the moveables that were promised, the rent shall be lessened so much. Ibid.—[Ed.] [See Mr. Butler's note at the end of the volume. Note. 1.]

Also of conditions in deed, some be annexed to the rent reserved out of the land, and some to collateral acts, &c.: some be single, some in the conjunctive, some in the disjunctive, as shall evidently appear in this chapter, where the examples of these divisions shall be explained in their proper place.

Mir. cap. 2,
sect. 15. & 17.

Of conditions in law more shall be said hereafter in this chapter.

*UPON condition in deed is, as if a man by deed indented infeoffs another in fee-simple (5), reserving to him and his heirs yearly a certain rent payable at one feast or divers feasts per annum, on condition that if the rent be behind, &c. that it shall be lawful for the feoffor and his heirs into the same lands or tenements to enter, &c. (Ou si terre soit alien a un home en fee rendant a lui certaine rent, &c.) (A) And if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by (6) half a year, &c. that then it shall be lawful to the feoffor *and his heirs to enter, &c. (7) In these cases if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and them in his former estate to have and hold, and the feoffor quite to oust thereof. And it is called an estate upon condition,* because that the state of the feoffee is defeasible, if the condition be not performed, &c.*

LITTLETON.
[Sect. 325.
201 a.]
Conditions in
deed.

(4)*

*201 b.

Here Littleton putteth one example of six several kinds of conditions. That is, first, of a single condition in deed. Secondly, of a condition subsequent to the estate. Thirdly, a condition annexed to the rent, &c. Fourthly, a condition that defeateth the estate. Fifthly, a condition that defeateth not the estate before an entry. And lastly, a condition in the affirmative, which implieth a negative, (as behind or unpaid implieth a negative) viz. not paid. All which do appear by the express words of Littleton.

IN the same manner it is if lands be given in tail, or let for term of life, or (8) of years, upon (9) condition, &c.

LITTLETON.
[Sect. 326.
202 b.]

This &c. implieth the several kinds of conditions in deed before specified. 202 b.

*ALSO, divers words (amongst (10) others) there be, which by virtue of themselves make estates upon condition; one is the word (11) sub conditione: as if A. infeoff B. of certain *land, to*

LITTLETON.
[Sect. 328.
203 a.]
*203 b.

(5) simple not in L. and M. nor Roh.

(9) *tiel* added in L. and M. and Roh.

(6) *un-demy* not in L. and M. nor Roh.

(10) *les* added in L. and M. and Roh.

(7) *Et* added in L. and M. and Roh.

(11) *sub conditione—de condicion* in L. and

(8) *a terme* added in L. and M. and Roh. M. and Roh.

(A) Part of the original French is here inserted, because the words "rendant a lui certaine rent," &c. are not noticed in the translation of the section, though the same words are commented by Lord Coke, 201 b. [Note from 18th Lond. Ed. 1823.]

1. By what words created. Effect of the words, "sub conditione." *have and to hold to the said B. and his heirs upon (12) condition, that the said B. and his heirs do pay, or cause to be paid to the aforesaid A. and his heirs yearly such a rent, &c. In this case, without any more saying, the feoffee hath an estate upon condition.*

203 b. *"Such a rent, &c."* This (&c.) implieth any other rent, or sum in gross, or any collateral condition whatsoever, either to be performed by the feoffee, (whereof our author here putteth his case) or by the feoffor, and extendeth to all kinds of conditions in deed before specified.

203 a. Here in this and the next two sections Littleton doth put four examples of words that make conditions in deed: and first, *sub conditione*. This is the most express and proper condition in deed, and therefore our author beginneth with it.

Subcondit. Marie, Dyer 138. 27 H. 8. 15. 13 H. 4. Entire Cong. 67. 20 Ass. 7. 33 Ass. 11. 40 Ass. 13. Bracton, ubi supra. Flota, lib. 4. cap. 9. Brit. cap. 36. et ubi supra.

(5)* **ALSO, if the (13) words were such, Provided always, that the aforesaid B. do pay or cause to be paid to the aforesaid A. such a rent, &c.; or these, So that the said B. do pay or cause to be paid to the said A. The said rent, &c.; in these cases, without more saying, the feoffee hath but an estate upon condition; so as if he doth not perform the condition, the feoffor and his heirs may enter, &c.*

203 b. *"Provided always, that B. pay, &c."* Our author putteth his case where a *proviso* cometh alone. And so it is if a man by indenture letteth lands for years, provided always, and it is covenanted and agreed between the said parties, that the lessee should not alien; and it was adjudged that this was a condition by force of the *proviso*, and a covenant by force of the other words (a).

Proviso. Vid. sect. 220. Dyer. 28 H. 8. fol. 13. 27 H. 8. fol. 14. 16. 13 H. 4. Entire Cong. 57. Seignior Cromwell case, lib. 2. fol. 71. 72. at large. 36 H. 8. tit. Condition. Br. lib. 8. 89. Frances' case. (3 Rep. 70 b.)

(*) 27 H. 8. 15. &c. Ita quod. This word *proviso* shall be also taken as a limitation or qualification, as hereafter in his proper place shall be said. And sometimes it shall amount to a covenant. All which do appear by the authorities in the margin (*).

Flota, lib. 4. cap. 9. Bracton, ubi supra. Britton, ubi supra. For the &c. in this section explanation is made in the section next before.

(12) *ita* added in L. and M. and Roh. (13) *parols—condicions* in L. & M. & Roh.

(a) So the word "proviso" may operate as a condition, although there be covenants before. 3 Dy. 311. 2 Co. 70 b. 1 Rol. Abr. 410. But if the clause in which it stands has dependence on another clause of the deed, or be the words of the feoffee, to compel the feoffor to do something, then it is not a condition, but only a covenant. Sheph. Touch. 122. Moor, 307. 707.

Where the word "proviso" shall be taken to be only a qualification or explication of a covenant or grant, see 2 Leon. 128. 3 Leon. 225, 226. Dy. 222. 4 Leon. 70. 3 Leon. 16. Poph. 119. Gouldsb. 131. And. 71, 72. Mo. 707. 2 Co. 72 a. As to the difference between a condition, a remainder, and a conditional limitation, see the note to fo. 214 b. post. —[Ed.] [See Mr. Butler's note at the end of the vol. Note 2.]

"Ita quod." This is the third condition in deed, whereof our author maketh mention. (Dyer 12 b.)

*ALSO, there be other words in a deed which cause the tenements to be conditional. As if upon such feoffment a rent be reserved to the feoffor, &c. and afterward this word is put into the deed (14), That if it happen the aforesaid rent to be behind in part or in all (15), that then it shall be lawful for the feoffor *and his heirs to enter, &c.; this is a deed upon condition.* LITTLETON. [Sect. 330. 203 b.] Quod si contingat. (6)*

"Quod si contingat, &c." This is the fourth condition in deed set down by our author. 203 b. (Ante 146 b.) 6 E. 2. Enrie Cong. 66. 8

§2. Ass. 326. adjudged. Quod si contingat. Pasch. 27. El. Rot. 264. inter Sayer et Hares in Com. Banco.

BUT there is a diversity between this word si contingat, &c. and the words next aforesaid, &c. For these words, si contingat, &c. are nought worth to such a condition, unless it hath these words following, "That it shall be lawful for the feoffor and his heirs to enter," &c. But in the cases aforesaid, it is not necessary by the law to put such clause, scilicet, "that the feoffor and his heirs may enter," &c. because they may do this by force of the words aforesaid, for that they contain (16) in themselves a condition, scilicet, that the feoffor and his heirs may enter, &c. Yet it is commonly used, in all such cases aforesaid, to put (17) the clauses in the deeds, scilicet, if the rent be behind, &c. that it shall be lawful to the feoffor and his heirs to enter, &c. And this is well done, for this intent, to declare and express to the common people, who are not learned (18) in the law, (19) of the manner and condition of the feoffment, &c. As if a man seised of land (20) letteth the same land to another by deed indented for term of years, rendering to him a certain rent, it is used to be put into the deed, that if the rent be behind at the day of payment, or by the space of a week, or a month, &c. that then it shall be lawful to the lessor to distrain, &c. (21) yet the lessor may distrain of common right for the rent behind, &c. though such words were not put into the deed, &c. LITTLETON. [Sect. 331. 204 b.] (Diversity between quod si contingat, and other words of condition.)

Or a month, &c. Here, albeit the clause of distress be added, that if the rent be behind by the space of a week or a month, that the lessor may distrain, yet he may distrain within the week or month, because a distress is incident of common right to every rent-service. And the words be in the affirmative, and therefore cannot restrain that which is incident of common right. 206 a.

The other &c. in this section upon that which hath been said are evident. (7)

(14) *cest parol* not in L. and M. nor in Roh.

(15) *Uc.* added in L. and M. and in Roh.

(16) *a—en* in L. and M. and Roh.

(17) *les tiels* in L. and M. and Roh.

(18) *en la—de* in L. and M., *de la* in Roh.

(19) *de la manner—le matiere* in L. and M. and Roh.

(20) *come de franktenement* added in L. and M. and Roh.

(21) *et* added in L. and M. and Roh.

304 a. By section 330, it is evident that some words of themselves do make a condition, and some other (whereof our author in section 331 putteth an example) do not of themselves make a condition without a conclusion and clause of re-entry: and many times (*si*) makes a condition (*c*), and sometimes a limitation, as hereafter shall be said in this chapter.

Vid. sect. 331.
3 H. 6. 7. Si.
Fleta, lib. 4.
cap. 9. Bract.
11b. 4. fo. 213b.
(5 Rep. 9.)
Si,

(*) 4 Mar.
Dyer 138b.

Inesse potest donationi modus, conditio, sive causa. () Scito quodd (ut) modus est (si) conditio (quia) causa.*

Bracton, ubi
supra.

Conditio is explained before. *Modus* is at this day properly taken for a modification, limitation, or qualification, for the which also the law hath appointed apt words; and because Littleton speaketh of this also in the end of this chapter, I will reserve this matter to his proper place, where, the reader shall perceive excellent matter of learning touching this point.

and Pro.
Pro. 24 E. 2.
34. (Hob. 41.
42. 10 Rep.
42. Flo. 141 a.
7 Rep. 9 b. 10.
26 b. Ante.
144 a. 9 Rep.
50 a. Post.
227 a.)

Causa, the cause or consideration of the grant. And herein there is a diversity between a gift of lands, and a gift of annuity, or such like. For example, if a man grant an annuity *pro una acra terræ*, in this case this word *pro* sheweth the cause of the grant, and therefore amounteth to a condition; for, if the acre of land be evicted by an elder title, the annuity shall cease; for *cessante causâ cessat effectus*.

And so if an annuity be granted *pro decimis*, &c. if the grantee [A] be unjustly disturbed of the tithes, the annuity ceaseth. And so it is if an annuity be granted *pro consilio*, and the grantee refuse to give counsel, the annuity ceaseth. So if an annuity be granted *quodd præstaret consilium*, this makes the grant conditional.

9 E. 4. 20. 32
E. 3. Annu.
30. 14 Ed. 4.
4. 15 E. 4. 2 b.
9 H. 6. 23. 5
E. 2. tit. Ann.
44. 41 E. 3. 19.
32 E. 1. Acrow-
rie 242. 21 E.
(8)*
4. 40. 22 E. 4.
24. 35 H. 6. 2.
10 E. 3. 24.
5 E. 2. 9 E. 4. 20. 15 E. 4. 3.

But if A. *pro consilio impenso*, &c. makes a feoffment, or a lease for life, of an acre, or *pro una acra terræ*, &c. albeit he denieth counsel, or that the acre be evicted, yet A. shall not re-enter; for in this case there ought to be legal words of condition or qualification; for the cause or consideration shall not avoid the state of the feoffee. *And the reason of this diversity is, for that the state of the land is executed, and the annuity executory.

Fleta, lib. 5.
cap. 34. 34
Ass. 1. 40
Ass. 13.

And yet sometimes in case of lands or tenements (*causa*) shall make a condition. As if a woman give lands to a man and his heirs, *causâ matrimonii prælocuti*, in this case if she either marry the man, or the man refuse to marry her, she shall have the land again to her and to her heirs. (a) But of the other side, if a man give land to a woman and to her heirs, *causâ matrimonii prælocuti*,

(a) 5 E. 2. Qui
in vita 34. tit.
Condition.
Br. 5 H. 4. 1.

(c) That the general meaning of the word "if" implies a condition precedent, unless it be controlled by other words, see *Bromfield v. Crowder*, 1 N. R. 325.—[Ed.]

[(A) Instead of grantee, it should be grantor, as it seems. See *Mr. Ritso's Intro.* p. 119. Note from 18th Lond. Edit. 1823.]

though he [B] marry her, or the woman refuse, he shall not have the land again, for it stands not with the modesty of women in this kind, to ask advice of learned counsel as the man may and ought ; (*) and the rather, for that in the case of the woman she may aver the cause, (for the reason aforesaid) although it be not contained in the deed, yea though the feoffment be made without deed.

(*) 12 E. 1. 1.
Feoffment
and Faint,
114. F. N. B.
206 L. Vid.
sect. 366.

If a man maketh a feoffment in fee, *ad faciendum*, or *faciendo*, or *ex intentione*, or *ad effectum*, or *ad propositum*, that the feoffee shall do or not do such an act, none of these words make the state in the land conditional ; for in judgment of law they are no words of condition ; and so was it resolved, Hill. 18th Eliz. in Com. Banco, in the case of a common person ; but, in the case of the king, the said or the like words do create a condition, and so it is in the case of a will of a common person, which case I myself heard and observed.

Less precise
words of con-
dition, suffi-
cient in the
king's case,
Ad faciend.
ex intentione,
&c. Dyer 138.
7 H. 4. 22. 31
H. 8. tit. Con-
dition, 19 Br.
Pl. Com. 142.
26 H. 6. 33. 36.
37. Doct. &
Stud. lib. 2.
cap. 34. 27

H. 8. 18 a. 22 E. 3. Breve 291. (1 Rol. Abr. 407. 408. 409. 410. Moore 57. 2 Leon. 33. 3 Rep. 64 a. 10 Rep. 42 a.) in wills and leases for years.

But, for the avoiding of a lease for years, such precise words of condition are not so strictly required, as in case of freehold and inheritance. (b) For if a man by deed make a lease of a manor for years, in which there is a clause (and the said lessee shall continually dwell upon the capital messuage of the said manor, upon pain of forfeiture of the said term) these words amount to a condition.

(b) 7 E. 6.
Dyer 79. 28
H. 8. Dyer
27 a. subpena
forisfacturæ.

And so it is if such a clause be in such a lease, *Quod non licebet*, to the lessee, *dare, vendere, vel concedere statum, et sub pœnâ forisfacturæ*, this amounts to make the lease for years defeasible ; and so it was adjudged in the court of common pleas (c) in queen Elizabeth's time ; and the reason of the court was, that a lease for years was but a contract, which may begin by word, and by word may be dissolved.

Quod non li-
cebet. 3 E. 6.
Dy. 65. 66. 4
Mar. 138.

(c) Hill. 40 E.
Rot. 1610. In-
ter Browne
and Ayre.
Vid. Pl. Com.
142. Br. and
Bestone's
case.

*There is a difference between a rent and a re-entry, for, upon a gift in tail, or a lease for life, a rent may be reserved without deed (d) ; but a condition, with a re-entry, cannot be reserved in those cases, without deed.

(9)*
225 b.
2. What shall
be a good con-
dition, or not.
(35 E. 3. 21 a.
Post 306 b.
338 a. Sect.
214.)
LITTLETON.
[Sect. 359.
222 b.]
[Coke
222 b.]

ALSO, if a man make a deed of feoffment to another, and in the deed there is no condition, &c. (either in deed or in law) and when the feoffor will make livery of seisin unto him by force of the same deed, he makes livery of seisin unto him upon certain condition (22) ; in this case, nothing of the tenements passeth by the deed, for that the condition is not comprised within the deed, and the feoffment is in like force as if no such deed had been made.

(22) &c. added in L. and M. and Roh.

(B) Here, it seems, the text should be read as if the words, though he do not marry her, had been used by Lord Coke. Note to 18th Lond. Edit. 1823.

(D) This is to be understood, at common law, before the 29 Cha. 2. c. 3.—[Ed.]

225 b.
(4 Rep. 26 a.)
13 E. 3. 19. 33.
17 Ass. p. 20.
8 H. 5. 8. 27
H. 6.

And the reason hereof is, for that the estate passeth by the livery of seisin (23). And in this case the feoffor, upon the delivery of seisin, must express the state to him and his heirs, or the heirs of his body, &c.

34 Ass. Pl. 6.

If an agreement be made between two, that the one shall infeoff the other upon condition, in surety of the payment of certain money, and after the livery is made to him and his heirs generally, the state is holden by some to be upon condition; inasmuch as the intent of the parties was not changed at any time, but continued at the time of the livery (E).

(10)*
13 E. 3. 19.
Estoppel 177.
19 E. 3. 19.
184.

* If a man make a charter of feoffment in fee, and the feoffor deliver seisin for life, the feoffee shall hold it but for life; but if the livery be expressly for life, and also according to the deed, the whole fee-simple shall pass; because it hath reference to the deed.

LITTLETON.
[Sect. 349.
216 a.]
Condition
precedent, to
enlarge an
estate when
good.

ALSO, if land be granted to a (24) man for term of two years upon such condition, that if he shall pay to the grantor within the said two years 40 marks, (25) then he shall have the land to him and to his heirs, &c. (here &c. implieth an estate in tail, or a lease for life); in this case, if the grantee enter by force of the grant, without any livery of seisin made unto him by the grantor, and after he payeth the grantor the 40 marks within the two years; yet he hath nothing in the land but for term of

(23) See post, 48 a.

(25) *que* added in L. and M. and Roh.

(24) *home* not in L. and M. nor Roh.

(E) A mortgage will not be easily presumed against an absolute conveyance, especially if the possession has gone along with the conveyance, *Cottrel v. Purchase*, Forrest. 61.; but parol evidence is admissible to show or explain the real intention and purpose of the parties, though the conveyance be absolute. *Maxwell v. Montacute*, Pre. Ch. 526. *Walker v. Walker*, 2 Atk. 98. *Joyne v. Statham*, 2 Atk. 388. So if a man for money mortgage land to B. by deed, being of greater yearly value than the interest money, and before the sealing of the deed it was agreed by word, that the mortgagor should have and receive the profits, not the mortgagee, this is good and usual in such cases, and B. may plead the verbal agreement to avoid the danger of usury. *Burglacy v. Ellington*, Brownl. Rep. 191. For, in such cases, the proof offered is not considered as a variation of the agreement, but only explanatory of what it was meant to have been.

But it is a general rule, that parol evidence is not admissible to contradict, or vary, or add to the terms of a deed, *Countess of Rutland's case*, 5 Co. 26. *Buckler v. Miller*, 2 Ventr. 107. *Tinney v. Tinney*, 3 Atk. 8. *Haynes v. Hare*, 1 H. Bl. 659. *Mease v. Mease*, Cowp. 47.: and where the deed is not impeached for fraud, or other illegal matter (*Colkins v. Blantern*, 2 Wils. 347. *Pole v. Harobin*, 9 East, 416. n. *Paxton v. Popham*, 9 East, 406.) no consideration can be averred or proved contrary to that expressed in the deed; though it is not considered to be contrary to, or inconsistent with a deed, to prove another consideration in addition to the consideration expressed. 2 Rol. Abr. 786. 1 Co. 176. *Dyer*, 146 a. *Vernon's case*, 4 Co. 3. *Craythorne v. Swinburne*, 14 Ves. 170. Phil. Law. Evid. 425.

So it is an established principle in courts of equity as well as in the common law courts, that parol evidence of the intention of the parties is not admissible to vary, or add to the terms of a written agreement. *Fell v. Chamberlaine*, 2 Dick. 424. *Hare v. Shearwood*, 1 Ves. 241. *Jordin v. Sawkins*, 3 Br. C. C. 388. *Jackson v. Cater*, 5 Ves. 688. *Wollam v. Hearne*, 7 Ves. 211. But when a court of equity is called upon to exercise its peculiar jurisdiction, by decreeing a specific performance, the party to be charged is admitted to show, that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed. S. C. 7 Ves. 219. *Clarke v. Grant*, 14 Ves. 524. *Ramsbottom v. Gooden*, 1 Ves. & B. 165. *Winch v. Winchester*, 1 Ves. & B. 375.—[Ed.]

two years, because no livery of seisin was made unto him at the beginning. For if he should have a freehold and fee in this case, because he hath performed the condition, then he should have a freehold by force of the first grant, where no livery of seisin was made of this, which would be (26) inconvenient, &c. But if the grantor had made livery of seisin to the grantee by force of the grant, then should the grantee have the freehold and the fee upon the same condition.

[Coke,
216 a.]
(8 Rep. 73.
Flowd. 184.)
(Ania 26.)

Here six things are to be observed. First, Littleton here putteth an example of a condition precedent (f). Secondly, that such a condition which createth an estate may be made *by parol without deed (g). Thirdly, that livery of seisin in this case must be made before the lessee enter (as Littleton here saith at the beginning), for, after his entry, livery made to him that is in possession is void (h). Fourthly, that if no livery of seisin be made, that no fee simple doth pass, although the money be paid. Fifthly, that it is inconvenient that the fee-simple should pass in this case without livery of seisin. Sixthly, that *argumentum ab inconvenienti* is forcible in law, as often hath been and shall be observed. See more of this kind of condition in the section next following (*) (i).

216 a.

(11)*

Vid. sect. 60.
(Post, 48 a.)

*ALSO, if land be granted to a man for term of five years, upon condition, that if he pay to the grantor within the two first years forty marks, that then he shall have fee, or otherwise but for term of the five years, and livery of seisin is made to him by force of the grant, now he hath a fee-simple conditional, &c. And if in this case the grantee do not pay to the grantor the forty marks within the first two years, then immediately after the said two years past, the fee and the freehold is and shall be adjudged in the grantor, because that the grantor cannot after the said two years presently enter upon the grantee, for that the grantee hath yet title by three years, to have and occupy the land by force of the same grant. (By this it appeareth, that albeit the lessee had *pro tempore* a fee-simple, yet after that fee-simple is divested out of him, and vested in the lessor, he shall hold the land for three years by the express limitation of the parties). And so, because that the condition of the part of the grantee is broken, and the grantor cannot enter, the law will put the fee and the freehold in the grantor. For if the grantee in this case makes waste, then after the breach of the condition, &c. and after the two *years, the grantor shall have his writ of waste. And this is a good proof then, that the reversion is in him, &c.*

LITTLETON.
[SEC. 350.
216 b.]

[Coke,
218 b.]

*217 a.

(26) *inconvenient, &c.*—*encontre reason* in (*) See the next note.
L. and M. and Roh.

(f) As to conditions precedent and subsequent, see ante, n. (A.) p. I. and infra, n. (x) p. 19.—[Ed.]

(g) That is, at common law, before the statute of Cha. 2. c. 3.—[Ed.]

(h) Vide 48 a. post, Chap. 36. Of feoffments.—[Ed.]

(i) See Mr. Butler's note at the end of the Vol. Note 3.

261 b. "Then he hath a fee-simple conditional, &c." The like is of
(3 Rep. 98.) an estate in tail, or for life.

On lease for years, conditioned to have fee, and livery thereupon, whether a fee conditional passes!

(12)*
31 E. 1. tit. Feoffments and Fairs, 119.

Many are of opinion against Littleton in this case, and their reason is, because the fee-simple is to commence upon a *condition precedent, and therefore cannot pass until the condition be performed; and that here Littleton of a condition precedent doth (before the performance thereof) make it subsequent: and, for proof of their opinion, they avouch many successions of authorities, that no fee-simple should pass before the condition performed. 31 E. 1. tit. Feoffments and Fairs 119. A. letteth a manor to B. for term of 20 years, and the deed would, that after the term of twenty years, that B. and his heirs should hold the said manor for ever by twelve pounds rent, A. taketh a wife, and dieth before the term be past, the wife of A. demands dower. And there Wayland, chief justice, saith, that the fee and the franktenement doth repose in the person of the lessor until the term be past, for before that the condition is not performed; for if the lessor had aliened the land before the end of the term, B. should not recover by a writ of assise, and by the death of the lessor the chief lord should have had the wardship * of the heir of the lessor; and by judgment the wife recovered dower, for the termor could not have fee, all which be the words of that book.

*217 a.

12 E. 2. tit. Voucher 265.
(3 Rep. 73.
Plow. 491.)

12 E. 2. tit. Voucher 265. I. letteth lands to B. for eight years, and if the lessor pay not a hundred marks to the lessee at the end of the term, that then he shall have fee: by the non-payment of the money, the fee and franktenement accrueth to him, and before, the lessee cannot be implied in a *præcipe*, neither shall he vouch.

(d) 7 E. 3. 10.
Pl. Com.
Sayer's case
272.

(d) 7 E. 3. 10. I. letteth certain lands to N. for the term of ten years, rendering a hundred shillings by the year to him and his heirs, and granted by deed, that if he held the lands over to him and his heirs, that he should render by the year £20: the lessor, during the term, brought an action of debt for the rent. And there Herle, chief justice of the common pleas, giveth the rule, that during the term the lessee had but for years, and therefore the action of debt maintainable.

(e) 44 E. 3.
tit. Attaint 22.
43 Ass. p. 41.

(13)*

(e) 44 E. 3. tit. Attaint. 22. & 43 Ass. p. 41. D. and A. enfeoff the two plaintiffs in the assise; they let those lands to S. for term of nine years upon condition, that if the plaintiff in the assise pay a hundred shillings to S. during the term, *that S. shall have it but for nine years, and if they pay it not, that S. shall have fee. S. continueth his estate by one year, and after granteth his estate to one H., which H. continueth his estate by two years, and granteth the residue of the term to R., and within the term of nine years the plaintiffs in the assise pay the hundred shillings to S. R. continueth his possession after the term, and infeoffeth D. which infeoffeth the Lord Furnival, against whom and others, without any claim or entry made by the plaintiffs, after the nine years ended, he brought his assise, and after adjournment recovered.

(f) 10 E. 3. 39 & 40. R. doth let certain lands to I. for term of twelve years, and in surety of his term he maketh a charter of the fee upon condition, that if he be disturbed within the term, that he cannot hold the lands until the end of the term, that then he shall hold the lands to him and his heirs for ever, and seisin was delivered upon the one charter and the other. R. within the term ploughed and sowed the land, and took the profits against the will of I., and I. upon this disturbance had fee and recovered in assise.

(f) 10 E. 3.
39. 40. 10
Ass. 15. tit.
Ass. 161. Pl.
Com. Brown-
ing's case
125.

6 R. 2. tit. *Quid juris clamat.* 20. If a lease be made for a term upon condition, if the lessee pay a certain sum within the term, that then he shall have fee, if he pay the money he shall have the fee, but if before the day of payment the lessor levieth a fine to another, the lessee ought to attorn by protestation; and if he pay the money, the conusee shall have it, and the conusee shall have the rent reserved until the day of payment; and if land be letten for term of years upon condition, that if the lessee be ousted within the term by the lessor, that he shall have fee, if he be ousted, he shall have fee by the condition, and notwithstanding he shall not have any assise, but he must have possession after the ouster, and of this he shall have an assise.

6 R. 2. tit.
*Quid juris
clamat.* 20.

And generally the books (*) are cited that make a diversity between a condition precedent, and a condition subsequent.

(*) 15 H. 7.
1. a. 14 H. 6.
18. 20. 3 H. 6.
6 b.
(g) Dyer. 10
Eliz. 281. Pl.
Com. 272.
Vid. Litt. in
the chapter
of Estates for
years.

And lastly, they cite Dyer, (g) 10 Eliz. 281. and in Say and Fuller's case, Pl. Com. 272., the opinions of Dyer and Browne.

*Notwithstanding all this, there are those that defend the opinion of Littleton, both by reason and authority. By reason, for that by the rule of law a livery of seisin must pass a present freehold to some person, and cannot give a freehold *in futuro*, as it must do in this case, if after livery of seisin made the freehold and inheritance should not pass presently, but expect until the condition be performed; and therefore if a lease for years be made to begin at Michaelmas, the remainder over to another in fee, if the lessor make livery of seisin before Michaelmas, the livery is void, because, if it should work at all, it must take effect presently, and cannot expect.

(14)*

Vid. Litt. in
the chapter
of Estates
for Years.

Secondly, they say that when the lessor makes livery to the lessee, it cannot stand with any reason that against his own livery of seisin a freehold should remain in the lessor, seeing there is a person able to take it. But if a man by deed make a lease for years, the remainder to the right heirs of I. S., and the lessor make livery to the lessee *secundum formam chartæ*, this livery is void, because during the life of I. S. his right heir cannot take (for *nemo est hæres viventis*;) and in that case the freehold shall not remain in the lessor, and expect the death of I. S. during the term; for although I. S. die during the term, yet the remainder is void, because a livery of seisin cannot expect.

(1) Rep. 130.
2 Rep. 67 a.
Post, 378 a.

217 b.
(2 Rep. 55.)

And they say further, that seeing all the books aforesaid prove that such a condition is good, and that the livery made to the lessee is effectual, by consequence the freehold and inheritance must pass presently or not at all.

(h) Hill &
Grange, Pl.
Com. 171.

(15)*
(i) 10 E. 3.
Seignior
Stafford's
case, lib. 8.
fol. 74. Pl.
Com. Ni-
choll's case,
487.

And it is not rare, say they, in our books, that words shall be transposed and marshalled so as the feoffment or grant may take effect. (h) As if a man in the month of February make a lease for years, reserving a yearly rent, payable at the feasts of Saint Michael the Archangel, and the Annunciation of our Lady, during the term, the law (in this case of reservation) shall make transposition of the feasts, viz. at the feasts of the Annunciation, and of Saint Michael the Archangel, that the rent may be paid yearly during the term. And *so it is (i) in case of a grant of an annuity. And further they take a diversity in this case between a lease for life and a lease for years. For in case of a lease for life with such a condition to have fee, they agree that the fee-simple passeth not before the performance of the condition, for that the livery may presently work upon the freehold; but otherwise it is in the case of a lease for years. Also they take a diversity between inheritances that lie in grant and inheritances that lie in livery. For they agree that if a man grant an advowson for years upon condition, that if the grantee pay twenty shillings, &c. within the term, that then he shall have fee, the grantee shall not have fee until the condition be performed. *Et sic de similibus*. But otherwise it is where livery of seisin is requisite, and therefore if the king make such a lease for years upon such a condition, the fee-simple shall not pass presently, because in that case no livery is made.

They also make several answers to the authorities before cited. For as to the case in 31 E. 1. they say that either the case is misreported, or else the law is against the judgment. For the case is but this, that a man make a lease of a manor to B. for twenty years, and that after the twenty years B. shall hold the manor to him and his heirs by twelve pound rent, and (as it must be intended) maketh livery of seisin, in this case it is clear (say they) that B. hath a fee-simple *maintenant*, for there is no condition precedent in the case.

Seignior Staf-
ford's case,
ubi supra.

As for the case in 12 E. 2, the case (as it is put in the book) is, that John de Marre made a charter to John de Burford of fee-simple, and the same day it was covenanted between them that John de Burford should hold the same tenements for eight years, and if he did not pay a hundred marks at the end of the term, that the land shall remain to John de Burford and his heirs. In which case, say they, there is direct repugnancy; for first, the charter of the fee-simple was absolute, and after the same day it was covenanted between them, &c. this covenant, being made after the charter, could neither alter the absolute charter, nor upon a condition precedent give him a fee-simple, that had a fee-simple before.

(16)*

*To all the other books, viz. 7 E. 3. 10 E. 3. 10 Ass. 44 E. 4. 44 Ass. and 6 R. 2. they say, that being rightly understood they

are good law ; for in some of these books, as namely, 10 E. 3. 10 Asa. &c. it appeareth that there was a charter made in surety of the term, which, say they, must be intended thus, *viz.* a man maketh a lease for years, the lessee enters and the lessor makes a charter to the lessee, and thereby doth grant unto him, that if he pay unto the lessor a hundred marks during the term, that then he shall have and hold the lands to him and to his heirs.

In this case, say they, there need no livery of seisin, but doth enure as an executory grant by increasing of the estate, and in that case, without question, the fee-simple passeth not before the condition performed.

Pl. Com. in
Nichol's
case, 487.

And therefore Littleton warily putteth his case of an estate made all at one time by one conveyance, and a livery made thereupon.

For Littleton himself in the section before saith, that in that case without a livery nothing passeth of the freehold and inheritance.

And this diversity (say they) is proved by books ; and thereupon they cite (k) 10 E. 3. 54. In a writ of dower the tenant vouched to warranty ; the vouchee as to part pleaded that the husband was never seised of any estate whereof she might be endowed ; as to the residue the tenant pleaded that he leased to the husband in gage upon condition, that if the lessor paid ten marks at a certain day, that he should re-enter, and if he failed of payment, that the land should remain to the husband and his heirs, which must be intended to be done by one entire act, and pleaded that he paid the money at the day, which is allowed to be a good plea ; *Ergo*, the fee-simple passed by the livery, otherwise the plea had amounted that the husband was never seised, &c. And, say they, that it cannot be intended that the judges should be of one opinion in Trinity term, and of another opinion in Michaelmas term in the same year, and therefore (they hold) *their several opinions are in respect of the said diversity of the case. (17)*

(l) 32 E. 3. tit. Garr. 30. A tenant by the curtesy made a lease for years, and in surety of the term, &c. made a charter in fee-simple, and made livery according to the charter (note a special mention made of livery in this case) ; and issue being taken in an assise, whether the *tenant by the curtesy demised in fee, upon the special matter found, it was adjudged that a fee-simple passed, and that the heir might enter for a forfeiture, which, say they, in case of livery is an express judgment in the point agreeing with the opinion of Littleton. (18)*

(l) 32 E. 3. tit.
Garr. 30.

*218 a.

(m) 43 E. 3. 35. In an action of waste against one in lands which he held for term of years, Belknap pleaded thus for the defendant : that the defendant was seised in fee, and infeoffed the plaintiff, &c. and after the plaintiff demised the land back again to the defendant for years upon condition, that if the defendant paid certain money, &c. that then the defendant might retain the land to him and to his heirs, and if not, the plaintiff might enter, &c. and

(m) 43 E. 3. 35.

pleaded that the term endured, and that the day of payment was not come, and demanded judgment, if the plaintiff may maintain an action of waste, inasmuch as the defendant had now a fee-simple, and showed forth the indenture of lease with the condition (which agreeth with Littleton's case), all being done at one time, and by one deed, and livery intended, and with Littleton's opinion also. It is true, say they, that Cavendish, accounsel with the plaintiff, offered to demur, but never proceeded. (n) Vide 20 Ass. pl. 20.

(n) 20 Ass. pl. 20.

Other authorities they cite, but these (as I take it) are the principal, and therefore for avoiding of tediousness, having I fear been too long upon this point, the others I omit. Only this they add, that Littleton had seen and considered of the said books, and have set down his opinion where livery of seisin is made upon a conveyance made at one time, as hath been said, that he hath fee-simple conditional.

(18)*
Lib. 2. fol. 90.
France's
case. (Dyer
46. Plowd.
7a.)

* *Benigne lector, utere tuo iudicio, nihil enim impedio. Conditio beneficialis quæ statum construit benignè secundum verborum intentionem est interpretanda, odiosa autem quæ statum destruit strictè secundum verborum proprietatem est accipienda* (1).

Condition precedent being uncertain, no estate can arise;

A lease is made to a man and a woman for their lives upon condition, that which of them two shall first marry, that one shall have fee, they intermarry, neither of them shall have fee, for the uncertainty.

so if it become impossible, though by act of the lessor.

Note, if the condition be to increase an estate (that is to say) to have fee upon payment of money to the lessor or his heirs at a certain day, before the day the lessor is attainted of treason or felony,

(1) In the case put by Littleton, and so fully commented on by Lord Coke, whatever doubt may exist as to the point whether the grantee took a conditional fee immediately on the conveyance and livery being made, it is quite clear that the condition itself is good, and that on performance thereof the fee-simple will pass. And it was resolved in *Lord Stafford's case* (8 Co. 74.), that such a grant may be good as well of things which lie *in grant* as of things which lie *in livery*; and may be annexed as well to an estate tail, which cannot be divested, as to an estate for life or years, which may be merged by the access of a greater estate. But such increase of an estate by force of such a condition ought to have four incidents:—1st. There ought to be a particular estate as a foundation for the increase to take effect upon, which particular estate must not be an estate at will, nor revocable, nor contingent. 2dly. Such particular estate ought to continue in the lessee, or grantee, until the increase happens, without any alteration of privity in estate by alienation of the lessee or grantee: but such increase need not take place immediately upon the particular estate, but may enure as a mediate remainder, subsequent to an intermediate remainder for life, or in tail to somebody else. 3dly. That the increase must vest and take effect immediately upon the performance of the condition, or never. 4thly. That the particular estate, and the increase, ought to take effect by one and the same instrument or deed, or by several deeds, delivered at one and the same time (which, in effect, is the same thing, for *quæ incontinenti fiunt in eae videntur*); because the particular estate, and the increase thereupon, is only a grant to take effect out of one and the same root; and though the increase vest at a different time, yet, when it is vested, it has its force and effect from the same grant. 8 Co. 77 a. *Fearne. Cont. Rem.* 420. 422. 4th ed. Et vid. *Sheph. Couch.* fol. 129. where another requisite is mentioned, namely, that the condition upon which the increase is to take place, must be possible and lawful. As to the doctrine, that a freehold at common law cannot be in abeyance, see the note to fol. 342 b.—[Ed.]

and also before the day is executed, now is the condition become impossible by the act and offence of the lessor, and yet the lessor shall not have fee, because a precedent condition to increase an estate must be performed, and if it become impossible, no estate shall rise. (Flow. 481 a. Post, 206 a. b.)

If a man make a feoffment in fee upon condition that the feoffee shall re-infeoff him before such a day, and before the day the* feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute, for "the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof." (o) And so it is if A. be bound to B. that J. S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could not be performed. And this is regularly true in all cases. (19)* 206 b. Condition subsequent becoming impossible by act of the feoffee, the estate is absolute: 25 H. 6. ut Barre 282. 37 H. 6. Barre 60. 2 E. 3. 9. 61 Eliz. Dyer 262. 26 H. 8.

(o) 4 H. 7. 4. 30 H. 8. Dyer 42. 11 H. 4. 57, in protection. 10 H. 7. 18. (Doc. Fin. 220. 30. (3 Rep. 59 a. 92 a. Hob. 24. Doc. Fin. 220.)

It is to be observed, that where the condition becometh impossible to be performed by the act of God, as by death, &c. the state of the feoffee shall not be avoided (x), as shall be said hereafter in this chapter. 206 a. so if by act of God.

(x) At the commencement of this chapter some observations were made as to conditions precedent and subsequent, which subject may be here conveniently resumed. Conditions precedent are such as must be punctually performed before the estate can vest. Conditions subsequent are when the estate is executed; but the continuance of such estate depends on the breach or performance of the condition. There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent; neither does it depend on the circumstance, whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant; for the same words have been construed to operate as either the one or the other, according to the nature of the transaction. *Hotham v. E. I. Company*, 1 T. R. 645. So in wills, it is fully settled, that a condition is to be construed to be precedent or subsequent, as the intent of the testator may require. The question always is, whether the thing is to happen before, or after the estate is to vest: if before, the condition is precedent; if after, it is subsequent. *Doc. d. Planner v. Scudamore*, 2 Bos. & Pul. 295.

Questions depending on the doctrine of conditions precedent and subsequent, frequently occur on devises to which a condition of marriage is annexed. With regard to which class of cases, it seems settled, that where a gift or devise, to which a condition in restraint of marriage is annexed, is of land, or a charge on land, if such condition be precedent, it must be strictly performed, in order to entitle the party claiming to the benefit of such gift, *Bertie v. Lord Falkland*, 3 Ch. Ca. 130. 2 Vern. 338, 339. 2 Freem. 220. *Fry v. Porter*, 1 Mod. 300. *Reeves v. Hearne*, M. 4 Geo. 2. 5 Vin. Abr. 343. *Harvey v. Aston*, 1 Atk. 361. *Pullen v. Reddy*, 1 Wils. 21. *Reynish v. Martin*, 3 Atk. 330. 1 Wils. 130. *Randall v. Payne*, 1 Bro. C. C. 55.; if the condition be subsequent, its validity will depend on its being such as the law will allow to divest an estate. 3 Atk. 377, 8. *Pullen v. Reddy*, 2 Atk. 587. 590. *Infra*, 206 b. But where the gift or legacy, to which a condition of marriage is annexed, is charged on personal estate, and there is no devise over, such condition is only considered in *terrorem*, whether it be precedent (*Harvey v. Aston*, *supra*. *Dalley v. Desbouverie*, 2 Atk. 261. *Reynish v. Martin*, *supra*. *Ellon v. Ellon*, 1 Wils. 159. 1 Ves. 4. 3 Atk. 504.), or subsequent. *Bellasis v. Ermine*, 1 Ch. Ca. 22. *Semphill v. Bayley*, Prec. Ch. 563. *Jervis v. Duke*, 1 Vern. 20. *Underwood v. Morris*, 2 Atk. 184. *Pullen v. Reddy*, 1 Wils. 21. 2 Atk. 587. *Marples v. Bainbridge*, 1 Mad. Rep. 590. And in such case, if the condition be subsequent, it shall not divest the legacy already vested; but, if the condition be precedent, it will (though in *terrorem*) necessarily prevent the legacy from vesting, until the marriage (though without any consent obtained) be performed. *Carbut v. Hilton*, 1 Atk. 381. *Atkyns v. Hiccocks*, 1 Atk. 500. *Pullen v. Reddy*, 2 Atk. 590. *Ellon v. Ellon*, 1 Wils. 159. (20)* 1 Ves. 4. 3 Atk. 504. *Hemmings v. Munkley*, 1 Bro. C. C. 303. *Knapp v. Noyes*,

Ambl. 662. But if the gift or legacy be given over, in the event of the condition being broken, then the condition will be allowed to prevail. *Sutton v. Jauke*, 2 Ch. Rep. 95. *Piggott v. Morris*, Sel. Ca. Ch. 26. *Bellasis v. Ermine*, 1 Ch. Ca. 22. *Stratton v. Grimes*, 2 Vern. 357. *Aston v. Aston*, 2 Vern. 452. *Wrottesley v. Wrottesley*, 2 Atk. 584. *Chauncey v. Graydon*, 2 Atk. 616. *Scot v. Tyler*, 2 Bro. C. C. 431. *Long v. Dennis*, 4 Burr. 2052. *Knight v. Cameron*, 14 Ves. 389. *Lester v. Garland*, 15 Ves. 248. A bequest of the residue is a sufficient devise over to support the condition. *Amos v. Horner*, 1 Eq. Ab. 112. pl. 9. *Scot v. Tyler*, supra. Conditions in restraint of marriage being considered in an unfavourable light, equity has dispensed with the want of circumstances, where the condition has been performed to a reasonable intent; as where the major part of the trustees or guardians consent (*Harvey v. Aston*, 1 Atk. 375. *Wisemen v. Foster*, 2 Ch. Rep. 23.), or where the trustees give an implied not an express consent (*Mesgret v. Mesgret*, 2 Vern. 580. *Harvey v. Aston*, supra.), or where they have given a conditional consent. *Daily v. Desbouverie*, 2 Atk. 261. 4 Burr. 2055. 2 Ves. 535. *Secus* if they consent conditionally upon the offer of a settlement being made, and afterwards retract that consent on a subsequent refusal to make the settlement, *Dashwood v. Bulkeley*, 10 Ves. 231; but a consent to marriage being once given, cannot be withdrawn by adding terms that do not go to the propriety of giving the consent; and a settlement made even after marriage, is sufficient, where the consent is given upon the offer of a settlement. *Ibid.* So where a father or guardian at first encourages proposals, and afterwards without sufficient reason denies his consent. *Campbell v. Lord Netterville*, 2 Ves. 534. *Lord Strange v. Smith*, Ambl. 263. So a general permission, given by the trustee after the legatee attained twenty-one, to contract marriage as she might think fit, and subsequent approbation of a marriage contracted under such general permission, without his knowledge, was held a sufficient compliance with such requisition. *Pollock v. Croft*, 1 Meriv. 181. So a marriage in the testator's life-time, with his consent or subsequent approbation, has been held to be equivalent to marriage with consent of the executors after his death. *Parnell v. Lyon*, 1 Ves. & B. 479.

Another class of cases to which the doctrine now under consideration frequently applies, are those cases which relate to the vesting of portions and legacies made payable at the future period:—As to which it is a general rule, that where a legacy or portion, charged upon a real estate, is to be paid at a certain age or time, if the legatee die before that age or time, it shall sink into the land: and this rule holds whether the land be the primary or auxiliary fund, and whether the charge be made by deed or will, as a portion or general legacy, for a child or stranger, with or without interest. *Pawlett v. Pawlett*, 1 Vern. 321. *Yate v. Phettiplace*, 2 Vern. 416. *Jennings v. Lookes*, 2 P. Wms. 276. *Duke of Chandos v. Talbot*, 2 P. Wms. 602. *Brown v. Abington*, 1 Atk. 482. *Van v. Clark*, 1 Atk. 510. *Gawler v. Standwick*, 1 Bro. C. C. 106 n. *Harrison v. Naylor*, 3 Bro. C. C. 108. But courts of equity have allowed and established exceptions to this rule in particular instances, as when the condition annexed to the legacy had respect to the circumstances of the estate and not to the person of the legatee, they having considered that a benefit was at all events intended for the legatee, and that the time of payment alone was postponed with a view to the convenience of the estate. *King v. Withers*, Forest. 117. *Hutchins v. Foy*, Com. Rep. 716. 723. *Lowther v. Condon*, 2 Atk. 127. *Emes v. Hancock*, 2 Atk. 507. *Sherman v. Collins*, 3 Atk. 319. *Hodgson v. Rawson*, 1 Ves. 44. *Tunstall v. Bracken*, Ambl. 167. *Embrey v. Martin*, Ambl. 230. *Manning v. Herbert*, Ambl. 575. *Teal v. Tichener*, 1 Bro. C. C. 120 n. *Clarke v. Ross*, *Ibid.* *Kemp v. Davy*, *Ibid.* *Pawsey v. Edgar*, 1 Bro. C. C. 192 n. *Thomson v. Dow*, 1 Bro. C. C. 193 n. *Morgan v. Gardiner*, *Ibid.* *Dawson v. Killett*, 1 Bro. C. C. 119. *Godwin v. Munday*, 1 Bro. C. C. 191. With respect to legacies payable out of personal estate, it is observable, that if the legacy be to the legatee, payable to him at a certain age, and the legatee die before he attain such age, yet this is a vested interest in the legatee (for it is *debitum in presenti*, though *solvendum in futuro*) and transmissible to his representatives, who however must wait till the time at which the legacy is payable, unless the whole interest be given. *Cloberry's case*, 2 Vent. 342. 2 Ch. Ca. 155. *Collins v. Metcalfe*, 1 Vern. 462. *Gordon v. Raynes*, 3 P. Wms. 138. *Anon.* 2 Vern. 199. So if the legacy be made to carry interest, though the words "to be paid or payable" are omitted, yet it is a vested and transmissible interest. *Cave v. Cave*, 2 Vern. 508. *Cloberry's case*, supra. *Stapleton v. Cheales*, 2 Vent. 673. *Hubert v. Parsons*, 2 Ves. 263. *Fonnereau v. Fonnereau*, 3 Atk. 645. But if the legacy be to the legatee generally, at or when he attain such age, it will lapse by the death of the legatee before such age: *Cloberry's case*, supra. *Snell v. Dee*, 2 Salk. 415. *Onslow v. Smith*, 1 Ab. Eq. 295, 6. *Dawson v. Killett*, 1 Bro. C. C. 119. But this distinction, which is borrowed from the ecclesiastical courts, does not prevail in the construction of devises of real estate, nor is it to be extended or favoured in the construction of personal legacies. See *Macell v. Winter*, 3 Ves. 544. 2 Fonbl. Tr. Eq. 366 n. With respect to legacies charged

*Wherein divers diversities are worthy of observation (L).

(31)*

First, between a condition annexed to a state in lands or tenements upon a feoffment, gift in tail, &c. and a condition of an obligation, recognizance, or such like. (p) For if a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet the state of the feoffee, &c. shall

(p) Pl. Com. 466. Wrothe's case. 14 H. 7. 3. 15 H. 7. 1. 14 E. 4. 3. 38 H. 6. 2. 3. Impossible

both upon the real and personal estate, if the legatee die before the time of payment, the legacy will sink into the land, in all cases where it would be held to sink, if the fund consisted of real estate only; and it will be considered vested with regard to the personal estate in all cases in which the same would be so adjudged, if the fund consisted of personal property only. *Sherman v. Collins*, 3 Atk. 320. *Duke of Chandos v. Talbot*, 2 P. Wms. 612. 2 Rop. on Leg. 216.

With respect to equitable relief:—It is a general rule, that the court of equity will never vest an estate where, by reason of a condition precedent, it will not vest in law. *Popham v. Bamfield*, 1 Vern. 83. *Lord Falkland v. Bertie*, 2 Vern. 333. Ch. Ca. 129. 2 Freem. 220. Where, therefore, there is a conditional limitation over in a given event, in such case, unless the condition be for payment of a certain sum of money (*Wheeler v. Whitall*, 2 Freem. 9. *Wallis v. Crimes*, 1 Ch. Ca. 89. *Woodman v. Blake*, 2 Vern. 232. *Bertie v. Falkland*, 2 Vern. 389.), or such as the court can put the party in the same situation as if the condition had been performed (*Taylor v. Popham*, 1 Bro. C. C. 168.), and it is not contained in a voluntary settlement (*Bold v. Corbett*, Prec. Ch. 84. *Woodman v. Blake*, 2 Vern. 221. Et vid. 1 Ch. Ca. 52.), the breach of the condition cannot be relieved. *Lord Falkland v. Bertie*, supra. *Clerk v. Lucy*, 5 Vin. 87. *Simpson v. Vickers*, 14 Ves. 341. *Sweet v. Anderson*, 5 Vin. 93. 2 Bro. P. C. 430. It is, in general, different as to conditions subsequent; for though the court cannot relieve against all conditions subsequent, yet where the court can in any case compensate the party in damages for the “non precise performance of the condition” equity will relieve. *Popham v. Bamfield*, supra. *Northcote v. Duke*, Ambl. 514. Et vid. *Barnardiston v. Fane*, 2 Vern. 366. *Grimston v. Lord Bruce*, Salk. 156. But, if compensation cannot be given, and the value of the thing for enforcing which the forfeiture is imposed, cannot be estimated, relief is denied. *Hargr. Jurisconsult Exercitationes*, 2 vol. 194. 1 Mad. Tr. Ch. 37. *Fry and Porter's case*, 1 Mod. 300.—[Ed.]

(1) In considering the effect of impossible conditions, Lord Coke here classes them under four distinct heads:—1st. Where they are possible at the time of their creation, but afterwards become impossible, either by the act of God, or by the act of the party. 2dly. When they are impossible at the time of their creation. 3dly. When they are against law as *malæ prohibitæ*, or *malæ in se*. 4thly. When they are repugnant to the grant by which they are created, or to the estate to which they are annexed. See these distinctions very well illustrated in Mr. Roper's Treatise of Legacies, chap. 7.—[Ed.] [It should be observed, that a condition is then only considered in the eye of the law as impossible at the time of the creation, if it can by any means take effect. Such is the case put by Lord Coke, that the obligee shall go from the church of St. Peter at Westminster, to the church of St. Peter at Rome, within three hours. But, if it only be in a high degree improbable, and such as is beyond the power of the obligee to effect, it is not then considered as impossible. See the cases of this nature in 1 Roll. Abr. 419, 420.—It is said, that if the condition of a bond be to pay a certain sum, or to do any other act, out of his majesty's dominions, the condition is void, and the bond is single, because the performance of it cannot be tried. See 21 Edw. 4. 10.—It was upon a similar principle, that if a man professed himself a monk in a religious house beyond fear, it was no disability, because the fact could not be tried. For the only method which the law had to know if a man was professed, was to issue a writ in the King's name to the Bishop of the diocese, commanding him to certify, if such a monk was professed in such a house, in such a place within his diocese. But this method could not be used with respect to foreign professions, as the bishop was not bound to obey the King's writ, and might certify either true or false, without subjecting himself to punishment. For this reason no notice was taken in our law of foreign profession. Thus de Rolle, 2 Abr. 43. says, “If an Englishman goes into France, and there becomes a monk, he is notwithstanding capable of a grant in England; for that such profession is not triable; and also for that profession is taken away by the statute; and by our religion now received, such vows and professions are held void. I have heard,” continues he, “that this was in 44 Eliz. in one Ley's case, resolved according by all the justices in Chancery Lane.—[Butler, Note 98.]

conditions.
Diversity
herein be-
tween a con-
dition annex-
ed to a feoff-
ment, and a
condition in
a bond, being
executory.
(22)*

(q) 15 H. 7. 18.
31 H. 6. Barre
60. 18 E. 4. 17.
9 Eliz. 262.
Dyer, lib. 5.
24. Laugher's
case.
36 H. 6. 2.

Fleta, lib. 4.
cap. 9. and
Bracton and
Britton ubi
supra.

*206 b.
(23)*

(1 Leon. 229.
1 Rol. Abr.
420. Cro. El.
281. 584.) 14
H. 8. 23. 10
H. 7. 22. 4 H.
7. 4. 8 E. 4.
1. 28 H. 8. 26.
lib. 5. fol. 22.
Laugher's
case & 75. 39
H. 8. 17 H. 8.

not be avoided. As if a man maketh a feoffment in fee upon condition, that the *feoffor shall within one year go to the city of Paris about the affairs of the feoffee, and presently after the feoffor dieth, so as it is impossible by the act of God that the condition should be performed, yet the estate of the feoffee is become absolute; for though the condition be subsequent to the state, yet there is a pre-
cedency before the re-entry, viz. the performance of the condition. And if the land should by construction of law be taken from the feoffee, this should work a damage to the feoffee, for that the condition is not performed which was made for his benefit. And it appeareth by Littleton (sect. 334.), that it must not be to the damage of the feoffee; and so it is if the feoffor shall appear in such a court the next term, and before the day the feoffor dieth, the estate of the feoffee is absolute. (q) But if a man be bound by recognizance or bond with condition that he shall appear the next term in such a court, and before the day the conusee or obligor dieth, the recognizance or obligation is saved; and the reason of the diversity is, because the state of the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent, viz. the performance of the condition. But the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken until there be a default in the obligor; and therefore in all cases where a condition of a bond, recognizance, &c. is possible at the time of the making of the condition, and before the same can be performed, the condition becomes impossible by the act of God (r), or of the law, or of the obligee, &c. there the obligation, &c. is saved. But if the condition of a bond, &c. be impossible at the time of the making of the condition, the obligation, &c. is single. And so it is in case of a feoffment in fee with a condition subsequent that is impossible, the state of the feoffee is absolute; but if the condition precedent be impossible, no *state or interest shall grow thereupon (n). And to illustrate these by *examples you shall understand: If a man be bound in an obligation, &c. with condition that if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, that then the obligation shall be void: the condition is void and impossible, and the obligation standeth good. And so it is if a feoffment be made upon

(m) But where the condition of a bond was to settle certain lands in such a manor by such a day, and the obligor died before the day, though the bond was saved at law, [yet chancery decreed an execution in specie. *Hotham v. Ryland*, Eq. Ab. 18.—[Ed.]

(n) Neither can equity relieve. *Cary v. Bertie*, 1 Vern. 340. *Graydon v. Hicks*, 2 Atk. 18. Supra. n. (x) So in case of legacies, if the condition be precedent, that is, if it is to be performed before the legacy vests in interest, although the condition be void from the impracticability or unlawfulness of the performance, yet, as the legacy is only given upon the terms of complying with the condition, the legacy, as depending upon it, must be also void. Show. P. C. 83. In this instance the common and civil laws differ; for by the latter, if the condition were impossible *ab initio* it was void, whether precedent or subsequent, and the legatee was entitled to his legacy, unless it was apparent that the testator supposed the condition possible at the time he created it. (Swimb. p. 4. sect. 6. *passim*. Et vid. as to the difference between the common law and the canon and civil laws, with respect to the doctrine of conditions, Fulb. Paral. p. 2. 7th Dials.) But in all cases of conditions becoming void, if such conditions be subsequent, the legacies will be considered absolute, that is, totally discharged from them. *Sir James Lowther v. Lord Charles Cavendish*, Amb. 356. 1 Rob. Leg. 299.—[Ed.]

condition, that the feoffee shall go as is aforesaid, the state of the feoffee is absolute, and the condition impossible and void.

Obligat. 18.
5 El. Dyer,
222.

(*) If a man make a lease for life upon condition that if the lessee go to Rome, as is aforesaid, that then he shall have a fee, the condition precedent is impossible and void, and therefore no fee-simple can grow to the lessee. (o)

(c) Pl. Com.
Fuller's case,
272. 1 Rol.
Abr. 418. Post,
217 b. 218.)

But it is commonly holden, (r) that if the condition of a bond, &c. be against law, that the bond itself is void.

Illegal con-
ditions. Con-
dition to do a
thing *malum*
in *se*, in a

(r) Vid. Bracton, Britton, Fleta, ubi supra. Bracton, li. 3. fol. 100. 2 E. 4. 2 & 3. 4 H. 7. 4 b. 10 H. 7. 23. 14 H. 8. 23. 42 E. 3. 6. 23. (1 Rol. Abr. 418. Pl. Com. 64 b.) 2 H. 4. 2. (2 Ven. 103.)

bond, the bond is void;

But herein the law distinguisheth between a condition against law for the doing of any act that is *malum in se*, and a condition against law (that concerneth not any thing that is *malum in se*) but therefore is against law, because it is either repugnant to the state, or against some maxim or rule in law. And therefore the common opinion is to be understood of conditions against law for the doing of some act that is *malum in se*: and yet therein also the law distinguisheth. As if a man be bound upon condition that he shall kill I. S. the bond is void. But if a man make a *feoffment upon condition that the feoffee shall kill I. S. the estate is absolute, and the condition void. (r)

(24)*
in a feoff-
ment, the es-
tate is abso-
lute. (Pl.
Com. Brow-
ning's case,
133.)

(o) A condition is considered as impossible in its creation, when it is to do a thing which cannot by any means be accomplished; but if it be only improbable, or out of the power of the obligee, it is not in law deemed impossible. As if the condition be "that a married man shall marry such a woman;" for it is possible that his present wife may die before him and the other woman. 1 Rol. Abr. 419. Or if it be, "that the pope shall be in London within a day." 1 Rol. Abr. 420. So, though it be out of human power; as "that it shall rain to-morrow;" for it is possible. 3 Com. Dig. 93.—[Ed.],

(r) All the instances of conditions against law are reducible under one of these heads; 1st. To do something that is *malum in se*, or *malum prohibitum*. 2d. To omit the doing of something that is a duty. 3d. To encourage such crimes and omissions. Such conditions as these the law will always, and without any regard to circumstances, defeat; being concerned to remove all temptations and inducements to those crimes. 1 P. Wms. 189. In illustration of this doctrine numerous instances might be adduced; but there are four classes of cases governed by this principle, which particularly deserve consideration:—1st. Bonds given *pro turbi causa*; as where the condition of the bond was, that the obligee and obligor should live together in a state of fornication. *Walker v. Perkins*, 3 Burr. 1568. 1 Bl. Rep. 517. But a bond given in consideration of past cohabitation with an unmarried woman is good; because it shall be intended as a compensation for the wrong done. *Turner v. Vaughan*, 2 Will. 339. *Marchioness of Annandale v. Harris*, 3 P. Wms. 432. *Gray v. Mathias*, 5 Ves. 286. But if the obligor was a married man, and the obligee knew him to be such, or if the obligee be a married woman; equity will not support the claim. *Robinson v. Gee*, 1 Ves. 254. *Priest v. Parrott*, 2 Ves. 169. *Lady Cox's case*, 3 P. Wms. 339. *Mathews v. Lee*, 1 Mad. Rep. 558.

2d. Bonds in restraint of trade:—The general rule laid down in the famous case of *Mitchel v. Reynolds* (1 P. Wms. 181.) is, that all restraints of trade (which the law so much favours), if nothing more appear, are bad. But to this general rule there are some exceptions; as first, that if the restraint be only particular in respect of the time or place, and there be a good consideration given to the person restrained, a contract or agreement upon such consideration so restraining a particular person, may be good and valid in law, notwithstanding the general rule. *Master, &c. of Gunmakers v. Fell, Willes*, 383. *Chesman v. Nainby*, 2 Stra. 739. 3 Bro. P. C. 349. *Clerk v. Comer*, Cas. Temp. Hardw.

53. 7 Mod. 230. *Davis v. Mason*, 5 T. R. 118. *Bunn v. Guy*, 4 East, 190. *Gale v. Reed*, 8 East, 86.

3d. Marriage brokerage bonds:—Bonds given for procuring marriages are illegal, being of dangerous consequence, and tending to the ruin of persons of fortune. *Hall v. Patten*, Show. P. C. 76. *Smith v. Bruning*, 2 Vern. 392. *Scribblehill v. Brett*, 2 Vern. 445. *Smith v. Ayckwell*, 3 Atk. 566. Amb. 66. *Cole v. Gibson*, 1 Ves. 506. And as contracts of this kind are avoided on the ground of public inconvenience, it has been therefore adjudged, that they will not admit of subsequent confirmation by the party. *Shirley v. Martin*, cited in 3 Cons. P. Wms. 74 n. So any private agreement, or treaty, infringing the open and public agreement on the marriage, is considered as fraudulent. *Peyton v. Bladwell*, 1 Vern. 240. *Hedman v. Redman*, 1 Vern. 348. *Gale v. Lando*, 1 Vern. 475. *Lamlee v. Hamman*, 2 Vern. 499. *Keat v. Allen*, 2 Vern. 588. *Webber v. Farmer*, 2 Bro. P. C. 88. *Morrison v. Arbutnot*, 1 Bro. C. C. 548 n. *Pitcairne v. Ogburne*, 2 Ves. 375. *Neville v. Wilkinson*, 1 Bro. C. C. 543. *Kay v. Bradshaw*, 2 Vern. 102. *Scott v. Scott*, 1 Cox. C. C. 366. And where a party, on a treaty of marriage, has been guilty of misrepresentation, equity will decree him to make it good. *Montefiori v. Montefiori*, 1 Bl. Rep. 363. *Duke of Hamilton v. Lord Mohun*, 1 Ab. Eq. 90. 1 P. Wms. 118. 1 Salk. 158. *Woodhouse v. Shepley*, 2 Atk. 535. *Jackson v. Duchaire*, 3 T. R. 551.; unless, indeed, the misrepresentation proceeded from mistake. See *Merewether v. Shaw*, 2 Cox. C. C. 124. And a material misrepresentation in the circumstances of persons contracting marriage will be decreed to be made good, even at the instance of the persons privy to the fraud. *De Manneville v. Crompton*, 1 Ves. & B. 355. *Neville v. Wilkinson*, 1 Bro. C. C. 543. A bond given as a remuneration to the obligee for having assisted the obligor in affecting an elopement and a marriage, without the consent of the wife's friends, is void, though given voluntarily after the marriage, and without any previous agreement for the same. *Williamson v. Gihon*, 2 Sch. & Lef. 357. Et vid. Toth. 27. 1 Ch. Rep. 87. And where money has been obtained by sale of influence in marriage brokerage, the court will decree the party to refund the sum received. *Goldsmith v. Bruning*, 1 Eq. Ab. 59. *Osborne v. Williams*, 18 Ves. 382.

4th. Bonds given for a consideration declared illegal by statute:—As gaming, by stat. 9 Ann. c. 14. s. 1. (see *Colborn v. Stockdale*, 1 Stra. 493. *Mazzeinghi v. Stephenson*, 1 Camp. N. P. C. 291.); *Sale of Office*, by stat. 5 & 6 E. 6. c. 16. s. 2. & 3. (see *Hornby v. Cornford*, Fitzg. 45. Willes, 573, 4. *Woodward v. Fox*, 3 Lev. 289. *Layng v. Paine*, Willes, 571. *Godolphin v. Tudor*, Salk. 468. *Browning v. Halford*, Freem. 19. *Law v. Law*, 3 P. Wms. 391. and Ca. Temp. Talb. 140.); *Simony*, by statutes 31 Eliz. c. 6. 12 Ann. stat. 2. c. 12. (see *Baker v. Rogers*, Cro. Eliz. 788. *Winschcomb v. Bishop of Winchester*, Hob. 165. *Barrett v. Glub*, 2 Bla. Rep. 1052. *Fytche v. The Bishop of London*, Cunningham's Law of Simony, in which last case it was decided by the house of lords, that general resignation bonds were illegal, as being simoniacal and against the statute 31 Eliz. But in cases where the statute against simony does not apply, or which are not precisely the same as the case of *Fytche v. The Bishop of London*, the court of king's bench have considered themselves as bound by prior authorities. *Legh v. Lewis*, 1 East, 391. *Partridge v. Whiston*, 4 T. R. 359. And therefore it has been determined, that a bond to resign on three months notice to be given by the patron, in order that the patron's son may be presented, and to keep the buildings in repair is good. 4 T. R. 359. Ibid. 78. Sed vid. *Dashwood v. Peyton*, 18 Ves. 37.); or *Usury*, by stat. 37 H. 8. c. 9. 13 Eliz. c. 8. 21 Jac. c. 17. s. 2. 12 Car. 2. c. 13. s. 2. 12 Ann. stat. 2. c. 16. See *Newson v. Whitley*, Cro. Car. 501. *Hinton v. Roffee*, 2 Show. 329. *Tate v. Wellings*, 3 T. R. 338. *Suales v. Bateman*, W. Jo. 409. *Morse v. Wilson*, 4 T. R. 353. *Harrison v. Hannel*, 1 Marsh, 349. By a statute passed last session, bills of exchange, or promissory notes, given for a usurious consideration, are not void in the hands of an indorsee if he had no notice thereof. St. 58 Geo. 3. c. 93. But although a security tainted with usury in its conception may be avoided even in the hands of an innocent purchaser for a valuable consideration without notice; yet a subsequent usurious contract will not avoid a security which was good at the time when it was made. *Perrall v. Shaen*, 1 Saund. 294. *Parr v. Ekason*, 1 East, 95. *Daniel v. Cartony*, 1 Esp. N. P. C. 274. And if the parties to an usurious contract cancel the original security which was usurious, and substitute one which is legal, the substituted security will be valid. *Wright v. Wheeler*, 1 Camp. N. P. C. 163. *Barnes v. Hedley*, 2 Taunt. 184.

That a bond, conditioned to do several things, may be void for illegality as to one part, and yet be good as to the other part, see *Norton v. Simms*, Hob. 14. Willes, 351. *Chesman v. Nainby*, Ld. Raym. 1456. Stra. 1138. [*Mosdell v. Middleton*, 1 Ventr. 237. *Pearson v. Humes*, Carter, 229.] *Newman v. Newman*, 4 Maul. & S. 66.—[Ed.]

If a man make a feoffment in fee upon condition that he shall not alien, this condition is repugnant and against law, and the state of the feoffee is absolute (whereof more shall be said in his proper place). But if the feoffee be bound in a bond, that the feoffee or his heirs shall not alien, this is good, for he may notwithstanding alien if he will not forfeit his bond that he himself hath made.

So it is if a man make a feoffment in fee upon condition, that the feoffee shall not take the profits of the land, this condition is repugnant and against law (q), and the state is absolute. But a bond with a condition, that the feoffee shall not take the profits is good. If a man be bound with a condition to enfeoff his wife, the condition is void and against law, because it is against the maxim in law, and yet the bond is good; but if he be bound to pay his wife money, that is good. *Et sic de similibus*, whereof there be plentiful authorities in our books.

ALSO, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void: because when a man so infeoffed (27) of lands, or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should ouster him of all power which the law gives him, which should be against reason, and therefore such a condition is void.

And the like law is of a devise in fee upon condition, that the devisee shall not alien (28), the condition is void. And so it is of a grant, release, confirmation, or any other conveyance whereby a fee-simple doth pass. For it is absurd and repugnant to reason, that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee-simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic, and bargaining and contracting between man and man: and it is within the reason of our author that it should ouster him of all power given to him. *Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem*; and *rerum suarum quilibet est moderator, et arbiter*. And again, *regulariter non valet pactum de re mea non alienanda*. But these are to be understood of conditions annexed to the grant or sale itself, in respect to the repugnancy, and not to any other collateral thing, as hereafter shall appear.

Where our author putteth his case of a feoffment of land, that is put but for an example: for if a man be seised of a seignory, or a

(25)*
(Post, sect. 360. 10 Rep. 38. Hob. 170. 1 Rol. Abr. 419.)
Secus as to a condition in a bond merely against some maxim of law.

7 H. 6. 43 b.
21 H. 6. 33.
21 H. 7. 11.
21 H. 7. 30.
20 E. 4. 8.
(Moore 810. Post, 226.)
Pl. Com. in Brownlow's case, 133 a.
27 H. 8.

(36)*
LITTLETON.
[Sect. 360. 222 b.]
Repugnant conditions. Condition not to alien, on a conveyance in fee void.

223 a.
(Ante, 206. 1 Rep. 85.)
21 H. 6. 34 a.
8 H. 7. 10 b.
33 Ass. 11. 24.
Doct. & Stud. 39. 124. 13 H. 7. 23. (5 Rep. 56 a.) Argumentum ex absurdo.
Vid. sect. 722.

(37) *de—en*, L. and M.

alien but to I. S. whether void? See *Mus-*

(28) "A devise in fee on condition not to *champ's case*, Bridgm. 132." Ld. Nott. MSS.

(q) So it is if there be a lease to three during their lives, provided that one shall not take the profits during the life of the other two. *Moor v. Savill*, 2 Leon. 132. Et vid. Hob. 170. Bults. 42.—[Ed.]

rent, or an advowson, or common, or any other inheritance that lieth in grant, and by his deed granteth the same to a man and to his heirs, upon condition that he shall not alien, this condition is void. But some have said, that a man may grant a rent-charge newly created out of lands to a man and to his heirs, upon condition that he shall *not alien that, that is good, because the rent of his own creation; but this is against the reason and opinion of our author, and against the height and purity of a fee-simple.

14 H. 4.
13 H. 7. 23.

A man before the statute of *quia emptores terrarum* might have made a feoffment in fee, and added further, that if he or his heirs did alien without licence, that he should pay a fine; then this had been good. And so it is said, that then the lord might have restrained the alienation of his tenant by condition, because the lord had a possibility of reverter: and so it is in the king's case at this day, because he may reserve a tenure to himself.

21 H. 7. 8. 11b.
5.56. Knight's
case.

Secus where
it is annexed
to a collateral
thing;

If A. be seised of Black Acre in fee, and B. enfeoffeth him of White Acre upon condition, that A. shall not alien Black Acre, the condition is good; for the condition is annexed to other land, and ousteth not the feoffee of his power to alien the land whereof the feoffment is made; and so no repugnancy to the state passed by the feoffment; and so it is of gifts or sales of chattels, real or personal.

LITTLETON.
[Sect. 361.
223 a.]
or is restric-
tive of alien-
ation to a
particular
person only:

*BUT if the condition be such, that the feoffee shall not alien to such a one, naming his name, or to any of (29) his *heirs, or of the issues of such a one, &c. or the like, which conditions do not take away all power of alienation from the feoffee, &c. then such condition is good.*

*223 b.
223 a.
Pl. Com. 77 a.
8 H. 7. 10b.
21 E. 4. 47 a.
*223 b.

If a feoffment in fee be made upon condition, that the feoffee shall not enfeoff I. S. or any of his heirs or issues, &c. this is good; for it doth not restrain the feoffee of all his power (a): the reason here yielded by our *author is worthy of observation. And in this case if the feoffee enfeoff I. N. of intent and purpose that he shall enfeoff I. S. some hold, that this is a breach of the condition; for *quando aliquid prohibetur fieri ex directo, prohibetur et per obliquum.*

(Dyer 46 a.
11 Rep. 74 a.)

Or in case of
alienations
prohibited by
law. 10 H. 7.
11. Doct. &
Stud. 124. 13
H. 7. 23.
Bracton, 11b.
1. fol. 13 a.
(28)*

If a feoffment be made upon condition, that the feoffee shall not alien in mortmain, this is good, because such *alienation by law; and regularly whatsoever is prohibited by the law may be prohibited by condition, be it *malum prohibitum* or *malum in se*. In ancient deeds of feoffment in fee there was most commonly a clause, *quod licitum sit donatori rem datam dare vel vendere cui voluerit, exceptis viris religiosis et Judæis.*

(29) see not in L. and M.

(a) So it has been held, that a condition against alienation, except to sisters or their children, annexed to a devise in fee, was good; and that for the breach of it, the heirs of the deviser might enter. *Doc. d. Gill v. Pearson*, 6 East, 173.—[Ed.]

ALSO, if lands be given in tail upon condition, that the tenant in tail nor his heirs (30) shall not alien in fee, (31) nor in tail, nor for term of another's life, but only for their own lives, &c. such condition is good. (Note here, the double negative in legal construction shall not hinder the negative, viz. *sub conditione quodd ipse nec hæredes sui non alienarent*. And therefore the grammatical construction is not always in judgment of law to be followed.) *And the reason is, for that when he maketh such alienation and discontinuance of the intail, he doth contrary to the intent of the donor, for which the statute of W. 2. (32) cap. 1. was made* (hereby it appeareth, that whatsoever is prohibited by the intent of any act of parliament, may be prohibited by condition, as hath been said), *by which statute the estates in tail are ordained.* (s)

307. Anta, 146 b. 10 Rep. 130. 4 Rep. 14.) [Coke, 224 a.] 10 H. 7. 11. 124. 13 H. 7. 23.

LITTLETON. [Sect. 362. 223 b.] Condition not to alien, on a gift in tail, good as to alienations working a discontinuance. [COKE, 223 b.] 33 Ass. 11. 24. lib. 6. 40. 41. Mildmay's case. 21 H. 6. 33. 13 H. 7. 23. 21 H. 7. 11. Vid. sect. 220. acc. (Cro. Car. 555. Hob. 191. Cro. Jac. Doct. & Stud.

**FOR it is proved by the words comprised in the same statute, (33) that the will of the donor in such cases shall be observed, and when the tenant in tail maketh (34) such discontinuance, he doth contrary to that, &c. And also in estates in tail of any tenements, when the reversion of the fee-simple, (35), or the remainder of the fee-simple is in other persons, when such discontinuance is made, then the fee-simple (36) in the remainder is discontinued. And because (37) tenant in tail shall do*

LITTLETON. [Sect. 363. 224 a.] (29)*

(30) *Esc.* added in L. and M.

(31) *ne—ou* in L. and M.

(32) *cap. 1.* added in L. and M.

(33) *que fuit al entent de le fessance de meme estatute* added in L. and M. and Roh.

(34) *tiel—un* L. and M. and Roh.

(35) *ou remainder en fee-simple*, not in L. and M. and Roh.

(36) *en la reversion ou le fee-simple*, added in L. and M. and Roh.

(37) *ceo ouster* in L. and M. and Roh.

(s) And such alienations, working a discontinuance, are deemed in law tortious acts, which may well be restrained by proviso. But it is otherwise of an alienation by suffering a common recovery, or levying a fine within the statutes 4 H. 7. c. 24. and 32 H. 8. c. 36; for this is no discontinuance, but a bar, and a liberty inseparable from the estate, as that tenant in tail may suffer a common recovery, cannot be restricted by any condition or proviso. Hob. 170. "For a condition annexed to an estate given, is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in anything expressed, nor in anything implied, which is of his nature incident and inseparable from the thing granted." Ibid. Et vid. *Sir Anthony Mildmay's case*, 6 Co. 41. 1 Co. 86. 9 Co. 128 b. Moor. 601. Cro. Jac. 697. Vent. 322. Jones, 58. *King v. Burchell*, Amb. 379. So if property is given to a man for his life, the donor cannot take away the incidents to a life estate. Property may be limited to a man to go over on a certain event, as bankruptcy, *Domett v. Bedford*, 3 Ves. 149. 6 T. R. 685. *Shee v. Hale*, 13 Ves. 404; but while his property it must be subjected to the incidents of property. Therefore, on a trust "to pay the dividends of stock from time to time into the proper hands of a man, or on his proper order or receipt, subscribed with his own hand, that they should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment, or any part thereof; on his decease, the principal to be paid to such persons as in a course of administration would become entitled to his personal estate, and as if it had been his personal estate, and he had died intestate;" it was held to be an interest for life in the dividends, assignable under a commission of bankruptcy; with a limitation over of the principal to those entitled under the statute of distributions. *Brandon v. Robinson*, 18 Ves. 429. Et vid. *Foley v. Burnell*, 1 Bro. C. C. 274. As to conditions restraining lessees from alienation, see n. (r) infra.—[Ed.] [See also Mr. Butler's note at the end of the volume. Note 4.]

no such thing against the profit (88) of his issues, and good right, such condition is good, as is aforesaid, (39) &c.

224 b. *"Against the profit of his issues."* Hereby it appeareth, that to restrain tenant in tail from alienation against the profit of his issues, is good, for that agreeth with the will of the donor, and the intent of the statute (*). But a gift in tail may be made upon condition, that tenant in tail, &c. may alien for the profit of his issues, and that hath been holden to be good, and not restrained by the said statute, and seemeth to agree with the reason of Littleton, because in that case *voluntas donatoris observetur*, &c. and it must be for the profit of the issues.

(*) 46 E. 2. 4.
(1 Rol. Abr.
418.)

223 b. *"But only for their own lives, &c."* And yet if a man make a gift in tail, upon condition that he shall not make a lease for his own life, albeit the state be lawful, yet the condition is good; because the reversion is in the donor. As if a man make a lease for life or years upon condition, that they shall not grant over their estate, or let the land to others, this is good (τ), and yet the grant

(6 Rep. 42a.
contra.) 21 H.
6. 32. 13 H. 7.
23. 24. 27 H.
8. 17. 19. 31
H. 8. Dyer,
45. (3 Rep.
64.)

(38) *de les issues*, not in L. and M. nor Roh. (39) *&c.* not in L. and M. nor Roh.

(τ) But such conditions are construed strictly in favour of the lessee. And therefore it has been determined, that if a lessee, who is restrained from alienation by a condition of this kind, assigns over his term with the consent of the lessor, such assignee may assign to any other person without a license. *Dumper's case*, 4 Co. 119. *Whitchot v. Fox*, Cro. Jac. 398. And it is immaterial whether the license be general, as in *Dumper's case*, or particular as "to one, subject to the performance of the covenants in the original lease," *Brummell v. Macpherson*, 14 Ves. 173.: though, if a covenant not to assign contain an exception in favour of assignment by will, it seems that executors, claiming under the will, are not within the exception, so as to be at liberty to sell for payment of debts without a license. *Lloyd v. Criepe*, 2 Taunt. 249. So an under-lease has been adjudged not to be within a proviso, that the lessee shall not assign without license. *Crusoe, d. Bugby v. Blencowe*, 3 Wils. 224. 2 Bl. Rep. 766. But where the words of the covenant were, that the lessee would not set, let, or assign over the whole or part of the premises without leave; it was held, that an under-lease amounted to a breach. *Roe, d. Gregson v. Harrison*, 2 T. R. 426. Et vid. *Roe, d. Dingley v. Sales*, 1 Maul. & S. 297. So where the proviso was, that the lease should be void "if the lessee assigned or otherwise parted with the indenture of lease, or the premises thereby demised, or any part thereof, for the whole or any part of the term, without leave in writing;" it was held, that the words included an under-lease. *Doe, d. Holland v. Worsley*, 1 Camp. N. P. C. 20.

It is, however, to be observed, that an assignment by operation of law will not amount to a forfeiture. Thus it has been determined, that a sale by execution was no forfeiture of a lease, in which was contained a covenant not to let, assign, or otherwise part with the indenture. *Doe, d. Mitchinson v. Carter*, 8 T. R. 57. *Secus* where the execution is in fraud of the covenant. 8 T. R. 300. And the same rule holds in the case of an assignment under a commission of bankruptcy. *Doe v. Bevan*, 3 Maul. & S. 353. Et vid. *Doe, d. Cheere v. Smith*, 5 Taunt. 795. But a landlord may guard against this contingency by a proviso for re-entry on the tenant's committing an act of bankruptcy whereon a commission shall issue; which has been held to be good. *Roe v. Gailliers*, 2 T. R. 133.

If the lessor accept rent due after condition broken, with notice, it is a waiver of the forfeiture. *Goodright, d. Walter v. Davids*, Cowp. 804. *Whitchot v. Fox*, Cro. Jac. 398. But a lessor who has a right of re-entry reserved on breach of a covenant not to underlet, does not, by waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting. *Doe, d. Boscawen v. Bliss*, 4 Taunt. 735. And equity will not relieve against a forfeiture by breach of a covenant not to assign. *Hill v. Barclay*, 18 Ves. 656.—
[Ed.]

or lease should be lawful. (†) If a man make a gift in tail, upon condition *that he shall not make a lease for three lives or 21 years according to the statute of 32 H. 8., the condition is good; for the statute doth give him power to make such leases, which may be restrained by condition, and by his own agreement; for this power is not incident to the estate, but given to him collaterally by the act; according to that rule of law, *quilibet potest renunciare juri pro se introducto*.

(†) Dier. 23
H. 8. fol. 48,
49. (10 Rep.
38, 39. 1 Rol.
Abr. 418.)
(30)*

“When he maketh such alienation and discontinuance of the entail.” And therefore if a gift in tail be made upon condition, that the donee, &c. shall not alien, this condition is good to some intents, and void to some; for as to all those alienations which amount to any discontinuance of the state tail (as Littleton here speaketh), or is against the statute of West. 2., the condition is good without question. But as to a common recovery, the condition is void; because this is no discontinuance, but a bar; and this common *recovery is not restrained by the said statute of West. 2. And therefore such a condition is repugnant to the estate tail; for it is to be *observed, that to this estate tail there be divers incidents. First, to be dispunished of waste. Secondly, that the wife of the donee in tail shall be endowed. Thirdly, that the husband of a feme donee, after issue, shall be tenant by the curtesy. Fourthly, that tenant in tail may suffer a common recovery; and therefore if a man make a gift in tail, upon condition to restrain him of any of these incidents, the condition is repugnant and void in law. And it is to be observed, (*) that a collateral warranty (v), or a lineal with assets, in respect of the recompense, is not restrained by the *Donis Conditionalibus*, no more is the common recovery in respect of the intended recompense. And Littleton, to the intent to exclude the common recovery, saith, *such alienation and discontinuance*, joining them together.

secus as to a
common re-
covery.
Vid. lib. 6. 40.
41. Sir An-
thony Mild-
may's case.
(1 Rep. 94.
1 Rol. Abr.
418.)

(1 Rol. Abr.
412. 418. 10
Rep. 36 b.
*224 a.

(31)*

22 E. 3. 9.
17 El. 342.
Dyer.

(v) 13 H. 7.
34 b.

(v) This must be understood of a collateral warranty before the statute of 4 Ann. c. 16. —For some observations as to the restraints which at different periods have been imposed on the free alienation of property, and the methods adopted to elude them, see the note to fol. 118 b. post, chap. 33. Of Title by Alienation.—[Ed.] [The restraints which at different times have been laid on the free alienation of property, and the different methods used to set them aside, form one of the most interesting parts of the history of every nation in which the feudal institutions have prevailed. So far as the history of England is concerned in them, they have been discussed with great accuracy by Sir William Blackstone, vol. 2. chap. 7. and Sir John Dalrymple, in the history of the Feudal Law, chap. 3. & 4. The introduction of recoveries, and the circumstances which led the way to them, are accurately stated and explained by Mr. Cruise, in his most excellent Essay on the Law of Recoveries. The restraints on the alienation of property are much greater in Scotland than they are in England. There if a *Tailzie* is guarded with *irritant and resolutive clauses*, the estate entailed cannot be carried off by the debt or deed of any of the heirs succeeding to it; in prejudice of the substitutes. This degree of tailzie differs from that of a *tailzie with prohibitory clauses*. The proprietor of an estate of this nature cannot convey it gratuitously, but he may dispose of it for onerous causes, and it may be attached by his creditors; yet the substitutes as creditors by virtue of the prohibitory clause, may by a process, called in the law of Scotland, an *Inhibition*, secure themselves against future debts or contracts. A third degree of tailzie used in Scotland is called a *simple distinction*. This amounts to no more than a designation who is to succeed to the estate, in case the temporary proprietors of it make no disposition of it; for it is defeasible and attachable by creditors. See Ersk. Inst. 238. 360. Butler. Note 133.]

If a man before the statute of *Donis Conditionalibus* had made a gift to a man and to the heirs of his body, upon condition that after issue he should not have power to sell, this condition should have been repugnant and void (w). *Pari ratione*, after the statute a man makes a gift in tail, the law *tacitè* gives him power to suffer a common recovery; therefore to add a condition, that he shall have no power to suffer a common recovery, is repugnant and void.

10 H. 7. 11.
18 H. 7. 23.
Lib. 6. 41 b.
in Sir Antho-
ny Mild-
may's case,
ubi supra.
(Hob. 261.
1 Rol. Abr.
421.)

(32)*

If a man make a feoffment to baron and feme in fee, upon condition that they shall not alien, to some intent this is good, and to some intent it is void; for to restrain an alienation by feoffment, or alienation by deed, it is good, because such an alienation is tortious and voidable; but to restrain *their alienation by fine is repugnant and void, because it is lawful and unavoidable.

It is said, that if a man infeoff an infant in fee, upon condition that he shall not alien, this is good to restrain alienations during his minority, but not after his full age.

Doct. & Stud.
124

It is likewise said, that a man by license may give land to a bishop and his successors, or to an abbot and his successors, and add a condition to it, that they shall not, without the consent of their chapter or convent, alien, because it was intended a mortmain, that is, that it shall for ever continue in that see or house, for that they had it *en auter droit*, for religious and good uses.

On gift in tail
with remain-
der in fee,
condition not
to alien, good
as to the in-
tail only.
(Post. 296. 333.
333.) 1 Rol.
Abr. 407. 472.
474. Cro. Eliz.
380.) 11 H. 7.
6. 13 H. 7. 22.
24. Dyer. 2 &
3. Phil. &
Mar. 127 b.

Put the case, that a man make a gift in tail to A., the remainder to him and to his heirs, upon condition that he shall not alien; as to the state tail the condition is good, for such alienation is prohibited, as hath been said, by the said statute. But as to the fee-simple, some say, it is repugnant and void, for the reason that Littleton hath yielded: and therefore some are of opinion, that this is a good condition, and shall defeat the alienation for the estate tail only, and leave the fee-simple in the alienee, for that the condition did in law extend only to the state tail, and not to the remainder.

LITTLETON.
[Sect. 364.
224 b.]
Condition to
re-enter on
discontinu-
ance of intail

ALSO, a man may give lands in tail upon such condition, that if the tenant in tail or his heirs alien in fee, or in tail, or for term of another man's life, &c. and also, that if all the issue coming of the tenant in tail be dead without issue, that then it shall be lawful for the donor and for his heirs to enter, &c.

(w) Lord Coke in another work observes, "that the tenant of lands intailed had before this statute a fee-simple conditional subsequent; for, albeit Britton (chap. 36), who wrote before this statute, saith, that if any purchase to him and his wife, and to the heirs of them lawfully begotten, the donees have presently but an estate of freehold for the term of their lives, and the fee accrueth to their issue, &c. taking the condition to be precedent, yet had the donees at the common law a fee-simple conditional presently by the gift. For if land had been given to a man and the heirs of his body issuing, and before issue he had, before this statute, made a feoffment in fee, the donor should not have entered for the forfeiture, but this feoffment had barred the issue had afterwards; which proveth that he presently by the gift had a fee-simple conditional." 2 Inst. 333.—[Ed.]

*And by this way the right (40) of the tail may be saved, (41) after discontinuance, to the issue in tail, if there be any (42); so as by way of entry of the donor or of his heirs, the tail shall not be defeated by such condition. (43) Quære hoc. And yet if the tenant in tail in this case, or his heirs, make any discontinuance, he in the reversion or *his heirs, after that the tail is determined for default of issue, &c. may enter into the land by force of the same condition, and shall not be compelled (44) to sue a writ of formedon in the reverter.*

and death of
issue, good.

(33)*

Note, Littleton purposely made parcel of the condition in the copulative, that the tenant in tail should alien, &c. For if a gift in tail be made to a man and to the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall re-enter, this is a void condition: for, when the issues fail, the estate determineth by the express limitation, and consequently the adding of the condition to defeat that which is determined by the limitation of the estate, is void (x), and in that case the wife of the donee shall be endowed, &c. And therefore Littleton, to make the condition good, added an alienation, which amounted to a wrong, and he restrained not the alienation only, (for then presently upon the alienation the donor, &c. might re-enter and defeat the estate tail) *but added, *and die without issue*; to the end, that the right of the estate in tail might be preserved, and not defeated by the condition, but might be recovered again by the issue in tail in a *formedon*.

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21 H. 7. 11.
(1 Rep. 16. 84.)

(Dyer, 342 b.)

*225 a.

And Littleton expressly saith, that the donor and his heirs, after the discontinuance, and after that the estate tail is determined, may re-enter, which is the intention and true meaning of Littleton in this place. And where it is said in this section (*quære hoc*) this is added by some that understood not this case, and is not in the original (y).

(Mo. 89.)

*ITEM, if (45) a feoffment be made (46) upon such *condition, that if the feoffor pay to the feoffee at a certain day, &c. 40 pounds of money, that then the feoffor may re-enter, &c. in this case the feoffee is called tenant in mortgage, which is as*

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[Sect. 332.
205 a.]
3. Mortgage.
(34)*

- (40) *de-en* in L. and M. and Roh. (45) *ascun* added in Roh. but not in L.
(41) *tiel* added in L. and M. and Roh. and M.
(42) *issue* added in L. and M. and Roh. (46) *a ascun home* added in Roh. but not
(43) *quære hoc*, not in L. and M. nor Roh. in L. and M.
(44) *coherit-arte* in L. and M. and Roh.

(x) Vid. Cro. Jac. 415. 448. 695. 3 Co. 19. [Poll. 479. Sir T. Jo. 79.] 3 Mod. 210. Ld. Raym. 101. 204. 2 Vern. 323. 1 Burr. 228. 2 P. Wms. 170. 605. Fearn. Cont. Rem. 168. Comp. 234. 410. 833. Dougl. 266. 3 T. R. 484. 488.—[Ed.]

(y) It is a rule of law, that a condition must defeat or determine the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the residue. And therefore it has been adjudged, that a condition to determine an estate tail, as if the tenant in tail were dead, was void; because the death of a tenant in tail did not determine the estate tail, but his death without issue. *Jermin v. Arscott*, 1 Co. 85. a. *Corbel's case*, 1 Co. 83. b. *Sir Anthony Mildmay's case*, 6 Co. 40. Cro. Eliz. 379. Moor. 592. And. 356.—[Ed.]

Origin of the term.

much to say, in French, as mortgage, and in Latin mortuum vadium. (1) And it seemeth, that the cause why it is called mortgage is, for that it is doubtful whether the feoffor (47) will pay at the day limited such sum or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him for ever, and so dead (48) to him upon condition, &c. And if he doth pay the money, then the pledge is dead to the tenant, &c.

205 a.
The different kinds of mortgage.
(c) Glanvil. lib. 10. cap. 68. & lib. 13. cap. 28. 27.

"Mortgage" is derived (s) of two French words, viz. *mort*, that is *mortuum*, and *gage*, that is *vadium*, or *pignus*. And it is called in Latin *mortuum vadium*, or *morgagium*. Now it is called here *mortgage*, or *mortuum vadium*, both for the reason here expressed by Littleton, as also to distinguish it from that which is called *vivum vadium*. *Vivum autem dicitur vadium, quia nunquam moritur ex aliquâ parte quod ex suis proventus acquiratur*. As if a man borrow a hundred pounds of another, and maketh an estate of lands unto him, until he hath received the said sum of the issues and the profits of the land, so as in this case neither money nor land dieth, or is lost, (whereof Littleton speaketh in this chapter) (t), and therefore it is called *vivum vadium* (z).

(c) Vid. sect. 327.

(47) *voyt-poet*, in L. and M. and Röh.

le money dont est le gage mort, not in L. and

(48) *a huy sur condition, &c. Et s'il paye* M. nor Roh.

(1) See Mr. Butler's note at the end of the volume. Note 5.

(z) The subject of mortgages may be considered under three general heads:—1st. Of the origin and different kinds of mortgages. 2d. Of the several interests of the mortgagor and mortgagee. 3d. Of the equity of redemption.

1st. As to the origin and different kinds of mortgages:—The notion of mortgaging and redemption seems to have been derived to us from the civil law. According to that law, the difference between pledges and things hypothecated was this: the *pignus* or pledge was, when any thing was obliged for money lent, and the possession passed to the creditor; the *hypotheca* was, when the thing was obliged for money lent, and the possession remained with the debtor. If the debtor did not redeem the thing pledged, the creditor was to foreclose the redemption of the debtor; and if the money was not paid, the creditor had his *actio pignoratitia*, or *hypothecaria*, which, when he had pursued, and obtained sentence thereon he might sell the pledge as his own property. But there was this difference between the *actio pignoratitia* and *hypothecaria*; that the *actio pignoratitia* was only on the person of the debtor to foreclose him, because the *pignus* was already in the possession of the creditor; but the *actio hypothecaria* was *tam in rem, quam in personam*, and was given *ad pignus prosequendum contra quemcunque possessorem*; because herein the creditor had not the possession of the pledge, but it remained to the debtor. Until sentence was obtained in these actions, the creditor could not obtain the property of the pledge; and if the money was paid before sentence, the pledge was subject to redemption; and where the same thing was pledged to several, those were said to be *potiores in pignore* to whom the things were first hypothecated. Digest, lib. 20. tit. 6. Corvin, 269, 270, 271. If the money was tendered or paid to the creditor, the contract of pignoration was dissolved, and the debtor might have the pledge back, as a thing lent. This seems to have introduced the notion among us of the debtor's right to redemption. And with them the usucaption, or the right of prescription, did not extinguish the pledge, unless a stranger had held it for thirty years, or the debtor had held it himself for forty years. Digest, lib. 20. tit. 6. The word "mortgage" signifies commonly the same thing as the word "pawn;" that is, the appropriation of the thing given for the security of an engagement: and these two words are used indifferently in the same sense. But the word "pawn" is more properly applied to moveable things, which are put into the hands and keeping of the creditor; and the word "mortgage" signifies properly the right acquired by the creditor upon the immoveables which are appropriated to him by his debtor, although he be not put into possession of

ALSO, as a man may make a feoffment in fee in mortgage, (35)
(49) so a man may make a gift in tail in mortgage, and a lease

(49) *assint home poit faire done en taile en mortgage*, not in L. and M. nor Roh.

them. Domat. lib. 3. tit. 1. sect. 1. Another difference between a mortgage and a pledge is, that the former is an absolute pledge to become an absolute interest, if not redeemed at a certain time; but the latter is a deposit of personal effects, not to be taken back but on payment of a certain sum, by express stipulation, or the course of trade, to be a lien upon them. 2 Ves. jun. 378. It was a rule of the feudal law, which prohibited all alienations, that *feudalia, invito domino, aut agnatis, non recte subjiciuntur hypothecæ, quamvis fructus posse esse, receptum est*, Corvin. Dig. 268; but at the time of Henry the Second, when the alienation of property had become free, two modes of mortgaging lands were in use, which were distinguished by the names of *vadium vivum* and *vadium mortuum*. Glanv. lib. 10. c. 8. The former kind is here described by Lord Coke, and is also mentioned by Littleton, sect. 327. post; the latter, which is the ordinary and usual way of mortgaging lands, has been already explained.

Mortgagees may be, 1st. either of the freehold and inheritance; or, 2d. of terms for years. The ancient way of making mortgagees of the freehold and inheritance, was by a charter of feoffment, on condition, that if the feoffor or his heirs paid the sum borrowed to the feoffee, or his heirs, at a day appointed, he should re-enter and repossess; and sometimes the condition was contained in the charter of feoffment, and sometimes it was defeasanced by a distinct instrument, bearing date, and executed at the same time. Madox, 318, 319. These sorts of conveyances were at first found to be attended with great inconveniences; as if the money was not paid at the day, so that the condition was forfeited, and the estate became absolute, the estate was thenceforth subject at common law to the dower of the wife of the feoffee, and to all his other real charges and incumbrances; for though if the feoffor performed the condition, then he might re-enter, and repossess himself in his former estate, and consequently was in, above all charges and incumbrances of the feoffee; yet if he did not literally perform the condition by payment of the money at the day, then the estate became *legally* subject to the charges and incumbrances of the feoffee, though the money should be afterwards paid, and the estate reconveyed to the feoffor. Post, fol. 221, 222. Hardr. 463. Cro. Car. 191. 1 Eq. Abr. 311. 5 Bac. Abr. 4. 1 Bl. Rep. 156. To avoid these inconveniences the second sort of mortgages were adopted, and it became usual to grant only a long term of years by way of mortgage, with condition to be void, upon repayment of the purchase-money; which course is now frequently used, principally, because, on the death of the mortgagee, such term becomes vested in his personal representatives, who now are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be. 2 Bl. Com. 158. But courts of equity, after their jurisdiction became firmly established, put mortgagees in fee upon the right footing, maintaining the power of redemption, as an equitable right inherent in the land, and binding all persons whomsoever, whether claiming in the *per* (i. e.) by the act of the mortgagee, as tenant in dower, by statute staple, *elegit*, &c.; or in the *post* (i. e.) by the act of the law, as tenant by the curtesy, and lord by escheat: and the principle upon which they proceeded was, that the payment of the money does, in the consideration of equity, put the mortgagor *in statu quo*, since the lands were originally only a pledge for the money lent. Cro. Car. 191. Hardr. 465. 469. 5 Bac. Abr. 4. And since this right of power of redemption has been so understood, mortgages in fee have again become usual; for, although mortgages for terms of years were free from the inconveniences attending mortgages in fee, with respect to tenant by dower, curtesy, &c. yet they were not without objection, as in case of foreclosure on nonpayment, the mortgagee became only a termor, the fee-simple remaining in the mortgagor.

Great inconveniences having been suffered by mortgages, from the difficulty and delay attending bills to foreclose, the ingenuity of modern times has framed a mode of conveyance in order to enable the mortgagee, after a given time, to procure his principal and interest by a sale of the mortgaged estate, without being under the necessity of applying to a court of equity. This is done by taking a conveyance of the fee to trustees in trust for the mortgagee, for a term of years subject to redemption, with remainder to the trustees in trust, in default of payment at the time stipulated, to sell the estate, and to apply the purchase-money, after defraying the expenses incurred in discharging the trust, in the payment of the mortgage money and interest, and then to pay over the residue, if any, to the mortgagor. 1 Pow. Mortg. 13. And it has been expressly determined, that in such case the trustees

(36)* *for term of life, or for term of years, in mortgage* (50). *And*
 LI TLETON. *all such tenants are called tenants in mortgage, according to*
 [Sect. 333. *the estates which they have in the land, &c.*
 205 b.]

(50) *et not in L. and M. nor Roh.*

alone may make an absolute irredeemable title without the concurrence of the mortgagor or his representatives. *Corder v. Morgan*, 18 Ves. 344. *Clay v. Sharpe*, cited in *Corder v. Morgan*, 18 Ves. 346.

Besides the different kinds of mortgages above mentioned, there is another class termed *equitable mortgages*; which were first established by the case of *Russell v. Russell*, 1 Bro. C. C. 209.; a decision frequently lamented. See *Ex parte Coombe*, 17 Ves. 371. *Ex parte Whitbread*, 1 Rose, 299. *Ex parte Hooper*, 1 Meriv. 9. A mere deposit of title deeds upon an advance of money, without a word passing, gives an equitable lien (*Ex parte Langston*, 17 Ves. 227. *Ex parte Kensington*, 2 Ves. & B. 83.) even against a purchaser without notice; and such deposit will cover subsequent advances, if it appear by evidence, or by implication, that they were made upon the faith of that security. *Hiern v. Mill*, 13 Ves. 114. *Ex parte Langston*, supra. *Ex parte Kensington*, supra. And the meaning and object of a deposit, may, it seems, be explained by parol evidence. See *Ex parte Haigh*, 9 Ves. 403. *Norris v. Wilkinson*, 12 Ves. 199. But a mortgage has been held to be no security for subsequent advances made on the strength of a parol engagement; for where the legal estate has been assigned by way of mortgage, the mortgagee is not entitled to say, I hold this conveyance as a deposit; because the contract under which he holds it is a contract for conveyance only, and not for deposit. *Ex parte Hooper*, 1 Meriv. 7. It has never yet been decided, how far it is necessary to deliver all the title deeds: or whether that would not be taken to be a sufficient deposit, which could be taken upon looking at the instruments to amount to evidence, that the estate was meant to be a security, *Ex parte Wetherell*, 11 Ves. 401.; but it has been held, that the delivery of deeds, for the purpose of having a mortgage drawn, will not amount to a deposit, or equitable mortgage. *Norris v. Wilkinson*, supra. An equitable mortgage will be made good as against assignees. *Jones v. Gibbons*, 9 Ves. 411. *Pye v. Daubez*, 2 Dick. 759. And where an assignee bought the bankrupt's estate, and out of the consideration money paid an equitable mortgagee, and took the deeds, which sale was afterwards set aside on the known principles of the court (viz. that a trustee cannot become a purchaser of the estate of which he is a trustee. *Ex parte Lacey*, 6 Ves. 627. *York Buildings Company, v. Mackenzie*; 8 Bro. P. C. 42 ed. Toml.), it was held, that the equitable mortgagee did not lose his lien. *Ex parte Morgan*, 12 Ves. 6. 1 Mad. Ch. 430. Equitable mortgages, however, are not favoured, especially when contradicting a written instrument. *Ex parte Coombe*, 17 Ves. 360.

2d. Of the several interests of the mortgagor and mortgagee:—With respect to the estate of the mortgagor, though it was formerly doubted whether he had more than a right of redemption, it is now established, that he has an actual estate in equity, which may be devised, granted, and tailed, and of which there is a *possessio fratris*, and a tenancy by the curtesy. *Casborne v. Scarfe*, 1 Atk. 603. But as to his possession of the mortgaged premises, he only holds them by the will or permission of the mortgagee, who has been held entitled, by ejectment, and without notice, to recover against him or his tenant. *Keeche v. Hail*, Dougl. 21. *Moss v. Gallimore*, Dougl. 279. 1 T. R. 378. But though a mortgagor in possession cannot make a lease to bind the mortgagee, yet a lease of this kind is good against the mortgagor and his heirs, and also against all strangers; and it will entitle the lessee to redeem the mortgage. 2 Cru. Dig. 110. And while the mortgagor continues in possession of the lands mortgaged, he is allowed by the stat. 7 & 8 W. & M. to vote for knights of the shire.

With respect to the interest of the mortgagee in the lands mortgaged, as soon as the conveyance is executed, he becomes seised or possessed of the legal estate, and may enter into possession, unless prevented by the express terms of the contract. And if the interest is not paid, he acquires, after giving notice of the mortgage to the tenant in possession, a right to the rent in arrear at the time of such notice, as well as to what accrues afterwards. *Moss v. Gallimore*, supra. 1 T. R. 331. 2 Ves. & B. 252.; but he cannot entitle himself to rents and profits received by the mortgagor, whilst he was permitted to retain possession. *Coleman v. Duke of St. Albans*, 3 Ves. 25. *Ex parte Wilson*, 2 Ves. & B. 252. In *Eaton v. Jacques*, Dougl. 454. it was held, that a mortgagee of a leasehold estate is not subject to the covenants in the lease, until he has entered into possession: but this decision has been disapproved. See *Westerdill v. Dale*, 7 T. R. 319. in which Lord Kenyon, C. J. observed that the mortgagee whether in or out of possession is the legal owner, and must

This section, upon that which hath been said, needeth no further illustration. *205b.

be so considered in a court of law, notwithstanding he is subject to equitable interests. Et vid. *Stone v. Evans*, cited in 7 East, 341. and reported in Woodfall's Land. and Ten. 2d. ed. p. 113. and Abbott, p. 20, in which case also his lordship denied the doctrine laid down in *Eaton v. Jacques*. See also *Lucas v. Comerford*, 1 Ves. jun. 233. S. C. 3 Bro. C. C. 166. In equity a mortgagee in possession is considered as a bailiff or steward to the mortgagor, and must account with him for the rents and profits actually received. 1 Vern. 476. 2 Atk. 334. *Anon.* 1 Vern. 45. Sel. Ca. in Ch. 63. But he will be entitled to such expenses as he is put to in preserving the estate, and may add them to the principal of his debt, for which he will be allowed interest. 3 Atk. 518. But if a mortgagee enters on the estate mortgaged, and yet allows the mortgagor to receive the rents and profits; or if he permits the mortgagor to make use of his incumbrance, in keeping out other creditors, he will be subject to account for the profits from the time when the creditors were entitled to their remedy. *Chapman v. Tanner*, 1 Vern. 267. 270. A mortgagee is not allowed to make a charge as receiver, if he himself has personally received the rents (*Godfrey v. Watson*, 3 Atk. 518. *Bonithow v. Hockmore*, 1 Vern. 316), though it be agreed that he should be paid for his trouble in so doing, *French v. Baron*, 2 Atk. 120.; and though a receiver might have been employed at the expense of the mortgagor. *Langstaff v. Fenwick*, 10 Ves. 405. *Gould v. Tuncred*, 2 Atk. 534. If, however, he has actually paid a bailiff for receiving the rents, he will be allowed such payments. 2 Atk. 534. And a mortgagee is in all cases entitled to his costs, unless his conduct has been vexatious and oppressive. — v. *Trecotthick*, 2 Ves. & B. 181. *Detillin v. Gale*, 7 Ves. 583. Where the gross sum received by a mortgagee exceeds the interest, it shall be applied to sink the principal, 2 Atk. 534.; and if he hold over after payment of his principal and interest, he will be charged with the balance and interest. *Quarrell v. Beckford*, 1 Mad. Rep. 269. A mortgagee in possession cannot make a lease of the lands, so as to bind the mortgagor, without an absolute necessity. *Hungerford v. Clay*, 9 Mod. 1. And he will be restrained in equity from committing waste. 2 Vern. 392. And the court will also decree an account to be taken of trees cut down, and direct the produce to be applied first, in payment of the interest, and then in sinking the principal of the debt. 3 Atk. 723. However, it has been held, that a mortgagee of a copyhold may pull down ruinous houses, and build better ones, to prevent a forfeiture. *Hardy v. Reeves*, 4 Ves. 480. If a mortgagee, in possession of a lease for lives or years, gets it renewed, he will be considered, in equity, as a trustee for the mortgagor; but he will be allowed to add the fines paid for renewal to his principal, and to receive interest on them. Sel. Ca. in Ch. 55. 2 Vern. 84. A mortgagee of a manor to which an advowson is appendant, or a mortgagee of an advowson in gross, cannot present to the living in case it becomes vacant, *Jory v. Cox*, Prec. Ch. 71. *Amhurst v. Dowling*, 2 Vern. 401. *Galley v. Selby*, Stra. 403.; though the deed contain a covenant, that, on any avoidance, the mortgagee should present: for in such case, though the presentation is not deemed the subject of value, and therefore cannot be brought into the account, yet it might be a benefit beyond the securing of the principal debt, and lawful interest thereon. *Mackenzie v. Robinson*, 3 Atk. 109. And here we may remark, that the relative situations of mortgagor and mortgagee are such as not to admit of a contract for a lease from the former to the latter; and, therefore, such a contract in consideration of forbearance, will be deemed usurious. *Gubbins v. Creed*, 2 Sch. & Lef. 218. And so is a lease for 999 years, though made at a fair value. *Webb v. Rorke*, Ib. 166. No contract, indeed, for a beneficial interest out of mortgaged premises from the mortgagor to the mortgagee, where the mortgage continues, if impeached within a reasonable time, ought to stand. This is the only proper principle with respect to such a transaction. Per Lord Redesdale, *Hickes v. Cook*, 4 Dow. 17. 26. 28. By the stat. 9 Ann. c. 5, a mortgagee, who has been in possession seven years, may vote for a knight of the shire.

A mortgage may be assigned; but the assignee will be only entitled to what is really due, and not to what may appear to be due on the face of the mortgage. *Matthews v. Walwyn*, 4 Ves. 118. *Chambers v. Goldwin*, 9 Ves. 264. And it is held, that, even after an assignment of a mortgage, payment to the mortgagee, without notice, must be allowed by the assignee, though the assignment were registered. *Williams v. Sorrell*, 4 Ves. 389. In equity a mortgage is considered to be only a chattel interest, and to convey nothing real in the land; neither dower nor tenancy by the curtesy. *Sparrow v. Harcastle*, cited 2 Ves. jun. 443. A mortgage does not merge by union with the fee. *Forbes v. Moffat*, 18 Ves. 384. And a mortgage, though in fee (the legal estate in which descends to the

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[Sect. 334.

205 b.]

(38)*

(40)*

4. Condition,
how to be

*ALSO, if a feoffment be made in mortgage upon condition, that the feoffor shall pay such a sum at such a day, &c. *as is (51) between them, by their deed indented, agreed and limited, although the feoffor dieth before the day of *payment, &c. yet if the heir (52) of the feoffor pay the same sum (53) of money at*

(51) *enter-perenter*, L. and M. and Roh.(53) *de money* not in L. and M. nor Roh.(52) *de added* in L. and M. and Roh.

heir at law), is considered in equity only as personal estate; and if the mortgagor does not redeem, the personal representatives of the mortgagee will be entitled to the land, *Ellis v. Greaves*, 2 Ca. in Ch. 50. *Barnett v. Kinaston*, 2 Vern. 401.: and it will pass by a will not made and executed with the solemnities required by the statute of frauds. *Martin v. Moulin*, 2 Burr. 969. And if the mortgagee by his will disposes of the money, it will carry his interest in the land. *Silberschildt v. Schiott*, 3 Ves. & B. 49. But if it appears to have been the intention of the mortgagee that it should go as real estate, the personal representative will not be entitled to it. *Noyes v. Mordaunt*, 2 Vern. 581. 2 Cru. Dig. 124.

3dly. Of the equity of redemption:—An equity of redemption is considered as a title in equity, and not merely as a trust, from which in many respects it materially differs. *Tucker v. Thurston*, 17 Ves. 133. "A power of redemption," says Sir Matthew Hale, "is an equitable right, inherent in the land, and binds all persons in the *post* or otherwise; because it is an ancient right, which the party is entitled to in equity." *Reece v. Attorney-General*, 2 Atk. 223. *Paulet v. Attorney-General*, Hardr. 465. An equity of redemption may be aliened, intailed, and devised (*Pettitt v. Ellis*, 9 Ves. 563.), and is descendible in the same manner as a trust estate. *Boscarrick v. Barton*, 1 Ch. Ca. 217. *Phillips v. Hele*, 1 Rep. in Ch. 190. An equity of redemption may also be mortgaged, in which case it is called a second mortgage. But this kind of mortgage is liable to two objections: 1st. That a third mortgagee, without notice, may, by paying off the first mortgage, acquire a preference over the second. 2d. That great difficulties may arise in calling in the money, for a second mortgagee has no legal remedy, but is driven to a suit in chancery to recover even his interest. But where a person, who has advanced money upon an equitable mortgage, without having any notice at the time of his mortgage of any previous incumbrance, can procure a conveyance of an outstanding term of years, prior to the first mortgage, he will acquire the legal estate, and equity will not interfere. *Marsh v. Lee*, 2 Vent. 337. 1 Ch. Ca. 162. *Churchill v. Grove*, 1 Ch. Ca. 36. *Higgon v. Siddal*, 1 Ch. Ca. 149. *Wortley v. Birkhead*, 2 Ves. 571. *Edmonds v. Povey*, 1 Vern. 187. *Bruce v. Duchess of Marlborough*, 2 P. Wms. 492. And see *Head v. Egerton*, 3 P. Wms. 279, where a prior incumbrancer was held to have the interest in the estate: but the court would not take away the deeds from a subsequent incumbrancer; allowing all the benefit he could have from those deeds, but giving him no interest in the estate. Et vid. *Evans v. Bicknell*, 6 Ves. 183. *Ex parte Kensington*, 2 Ves. & B. 83. An equity of redemption is subject to curtesy. *Cashborne v. Inglis*, 1 Atk. 603. But a woman is not allowed dower out of an equity of redemption of a mortgage in fee, upon the principle, that an equity of redemption is analogous to a trust estate, *Dixon v. Saville*, 2 Pow. Mort. 37.: though it is otherwise as to an equity of redemption of a mortgage for a term of years, because in this case the husband is seised of the freehold and inheritance. 2 P. Wms. 716. An equity of redemption is assets in equity (2 Atk. 294. Et vid. *The Creditors of Sir Charles Cox*, 3 P. Wms. 341. Amb. 308), except as against judgment creditors, who have a right to redeem. *Sharpe v. Scarborough*, 4 Ves. 553. But an equity of redemption of a mortgage in fee is not assets at law, the legal estate not being in the heir: though it is otherwise if the mortgage be by a demise for years; in which case a creditor may have judgment at law, with a *cessat executio*, during the term: and where an equity of redemption is devised to an executor for the payment of debts, it then becomes legal assets. *Girling v. Lee*, 1 Vern. 63.

The right of redemption is carefully protected by courts of equity, and they will not suffer any agreement in a mortgage deed to prevail, that the estate shall become an absolute purchase in the mortgagee upon any event whatever. *Howard v. Harris*, 1 Vern. 190. 2 Ch. Ca. 147. *James v. Oades*, 2 Vern. 402. *Toomes v. Slade*, 7 Ves. 273. And the right to redeem is not confined to the mortgagor, his heirs, executors, assignees, or subsequent incumbrancers, but extends to all persons claiming any interest whatever in the premises, as against the mortgagor: therefore a person claiming under a deed, void (as being voluntary) against a subsequent mortgagee, may redeem; for the deed, though void as to the mortgagee, is binding on the mortgagor, *Rand v. Cartwright*, 1 Ch. Ca. 59. 1 Vern. 193; *a fortiori*

the same day to the feoffee, or tender to him the money, and the feoffee refuse to receive it, then may the heir enter into the land; and yet the condition is, that if the feoffor shall pay such a sum at such a day, &c. not making mention in the condition* (41)* performed. In respect of the person to perform the same.

may any person who has acquired for valuable consideration an interest in the land, as a tenant under the mortgagor, *Keech v. Hall*, Dougl. 21, 22; or a judgment creditor, having previously sued out a writ of execution, *King v. Marissall*, cited in *Shirley v. Watts*, 3 Atk. 206, (though an equity of redemption cannot be affected by an execution, *Burden v. Kennedy*, 3 Atk. 739. *King v. Marissant*, 3 Atk. 262. *Sharp v. Scarborough*, 4 Ves. 542.); or a tenant by *elegit*, statute merchant or staple; or a tenant by the curtesy, or in dower, *Jones v. Meredith*, Bumb. 346.; or a jointress, *Howard v. Harris*, 1 Vern. 33.; the crown may also redeem estates mortgaged, and afterwards forfeited by the treason, &c. of the mortgagor. *Attorney-General v. Crofts*, 1 Bro. P. C. 222.

It is a rule of the court of chancery, that he who will have equity, must himself do equity (Francis's Max. 1.); and therefore if there be two mortgages, and one be defective, the court will not suffer one to be redeemed without the other. *Purefoy v. Purefoy*, 1 Vern. 29. *Shuttleworth v. Laywick*, 1 Vern. 245. *Mergrave v. Hooke*, 2 Vern. 207. *Pope v. Onslow*, 2 Vern. 286. *Ex parte Smith*, 2 Ves. jun. 372. And the heir at law of a mortgagor cannot redeem a mortgage made by his ancestor, without paying off money afterwards borrowed from the mortgagee on a second bond. *Shuttleworth v. Laywick*, supra. And, since the statute against fraudulent devises (3 W. & M. c. 14.), the devisee of the equity of redemption is in the same case with the heir. 1 Ab. Eq. 325. And the same rule applies to mortgages for terms of years, for, if the executor would redeem, he must discharge both the mortgage and bond. *Anon.* 2 Vern. 177. 1 P. Wms. 276. But it does not hold as against the mortgagor, *Challis v. Cashborn*, Prec. in Ch. 407. 7 Ves. 276.: *secus* as to a statute or judgment. *Mutthens v. Cartwright*, 2 Atk. 347. Et vid. 2 P. Wms. 494. *Shepherd v. Tilley*, 2 Atk. 348. *Baker v. Harris*, 16 Ves. 399. Though the heir cannot himself redeem without discharging both the mortgage and bond, yet, if he assign the equity of redemption, his assignee may redeem, upon payment of the mortgage only, *Coleman v. Winch*, 2 P. Wms. 775. *Hayly v. Robson*, Prec. in Ch. 89. Et vid. *Adams v. Claxton*, 6 Ves. 229.; as may also subsequent incumbrancers. *Morrett v. Paske*, 2 Atk. 54. Nor shall the mortgagee be permitted to tack his bond even against specialty creditors. *Lowthian v. Hazel*, 3 Bro. C. C. 162. For the only reason why the mortgagee can tack his bond to his mortgage (against the heir) is to prevent a circuitry of suits; as it is solely matter of arrangement; for in natural justice the right has no foundation. *Per Lord Thurlow, C. Ibid.* Et vid. *Hearne v. Bance*, 3 Atk. 630. *Powis v. Corbet*, 3 Atk. 356.

Where a mortgagee has been in possession twenty years, without any impediment in the mortgagor to assert his title, such as imprisonment, infancy, coverture, being beyond sea, &c. (where it is not by having absconded); or if such impediment has been removed ten years, it is a bar to a redemption. *Jenner v. Tracey*, 3 P. Wms. 287 n. *Ronney v. Ridgard*, 17 Ves. 99. *Trash v. White*, 3 Bro. C. C. 289. *Floyer v. Lavington*, 1 P. Wms. 263. *Anon.* 3 Atk. 313. *Corbett v. Barker*, 1 Anst. 38. Et vid. *Hodke v. Healey*, 1 Ves. & B. 539. And in such case, it seems, a demurrer will lie to a bill for an account. *Jenner v. Tracey*, supra. *Edsell v. Buchanan*, 4 Bro. C. C. 254. 2 Ves. jun. 84. And though infancy may be an answer to the objection as to length of time in not coming to redeem, yet where the time begins upon the ancestor, it will run on against his infant heir, as in the case of a fine at common law. *St. John v. Turner*, 2 Vern. 419. If, however, there have been acknowledgments that the estate was held in mortgage, and accounts have been kept, it seems that a possession of even fifty years will not bar a redemption. *Lake v. Thomas*, 3 Ves. 17. *Edsell v. Buchanan*, 2 Ves. jun. 84. 4 Bro. C. C. 256. *Proctor v. Couper*, 2 Vern. 377. Prec. Ch. 116. 1 P. Wms. 271. *Anon.* 2 Atk. 333. *Yates v. Hambly*, 2 Atk. 363. And if a man takes notice by a will or any other deliberate act (*Perry v. Murston*, 3 Bro. C. C. 399. *Anon.* 3 Atk. 314.), as an answer to a bill in chancery (*Proctor v. Oates*, 2 Atk. 140.), that he is a mortgagee, acknowledgments of that nature (though made in transactions with other persons, not with the heirs of the mortgagor, *Hansard v. Hardy*, 18 Ves. 455. Et vid. *Smart v. Hunt*, cited in *Hardy v. Reeves*, 4 Ves. 478 n.) will take the case out of the rule, that a mortgagor shall not redeem after twenty years. *Hodke v. Healey*, 1 Ves. & B. 536. But the mere demand of an account by the mortgagor, is not alone sufficient to prevent the effect of such a length of time. *Hodke v. Healey*, supra. 1 Mad. Ch. 417. *Hansard v. Hardy*, 18 Ves. 451. Where no time is appointed for payment of the mortgage money, length of time is no objection to a redemption: as where it was agreed that the mortgagee should enter and hold

On mortgagor's death before day of payment, his heir may perform the condition;

of any payment to be made by his heir; but for that the heir hath interest of right in the condition, &c. and the intent was but that the money should be paid at the day assessed, &c. and the feoffee hath no more loss, if it be paid by the heir, than if it were paid by the father, &c.; therefore, if the heir pay the money, or tender the money at the day limited, &c. and the other refuse it, he may enter, &c.

260 b. And so may his heir after his death.

205 b.
27 H. 8. 19b.
11b. 8. 61. 91.
Frances' case.
(1 Rol. 426.)

Albeit conditions be not favoured, yet they are not always taken literally, but in this case the law enableth the heir, that was not named, to perform the condition for four causes (54).

First, Because there is a day limited, so as the heir cometh within the time limited by the condition, for otherwise he could not do it, as shall be said hereafter in this chapter.

Secondly, For that the condition descends unto the heir, and therefore the law that giveth him an interest in the condition, giveth him an ability to perform it (A 1).

(43)* *Thirdly, For that the feoffee doth receive no damage or prejudice thereby (all these reasons are expressly to be collected out of the words of Littleton). And these things being observed,

Fourthly, The intent and true meaning of the condition shall be performed. And where it is here said, that the heir may tender at the day limited, &c. herein is implied that *the executors or administrators of the mortgage, or, in default of them, the ordinary may also tender, as shall be said (u) hereafter in this chapter. But

(u) Vid. sect. 237.

(54) "V. T. 15 Jac. After covenant to B. and his assigns; B. dies; he may tender stand seised to the use of B. and his heirs, to the heir, and revoke. *Allen's case*, 1 Ley, with proviso of revocation on payment to 55 b."—Hal. MSS.

till he was satisfied, it being in nature of a Welsh mortgage, *Ord v. Hemming*, 1 Vern. 418. *Howell v. Price*, Prec. Ch. 423. 1 P. Wms. 391. *Yates v. Hambly*, 2 Atk. 360: and time is no bar to a redemption in the case of a Welsh mortgage, unless twenty years have elapsed after payment of the principal and interest by perception of the rents and profits. *Fenwick v. Read*, 1 Meriv. 114. And where the mortgagor continues in possession even of any part of the premises (*Rakestraw v. Brewer*, Sel. Ca. Ch. 55. Et vid. *Corbett v. Barker*, 3 Anst. 755.), or where any species of fraud has been practised by the mortgagee (*Orde v. Smith*, Sel. Ca. Ch. 9. Forrest. 63. *Gore v. Stacpoole*, 1 Dow. 18.), length of time will not bar the right of redemption. On the other side, if the mortgagor be guilty of fraud, he will (by statute 4 & 5 W. & M. c. 16.) lose his equity of redemption. See *Stafford v. Selby*, 2 Vern. 589.

The doctrine as to the payment of the mortgage money, and the other points connected with the law of mortgages, will be considered in the subsequent notes to this chapter.—[Ed.]

(A 1) So where a person having two sons, B. and C., devised lands to his wife for life, and after her death to his son C. and his heirs; provided that if B. did, within three months after the death of his wife, pay to C., his executors, &c. the sum of 500*l*. then the said lands should go to B. and his heirs; the wife lived several years, and during her life B. died, leaving J. D. his heir; it was held, that the possibility of performing this condition was an interest or right, or *scintilla juris*, which vested in B. himself; and consequently such right descended on his heir, and according to Littleton (supra) might be performed by him. *Marks v. Marks*, 1 Ab. Eq. 106. 1 Stra. 129.—[Ed.]

what if the condition had been, if the mortgagor or heirs did pay, &c. and he died before the day without heir, so as the condition became impossible? Here it is to be observed, that where the condition becometh impossible to be performed by the act of God, as by death, &c. the state of the feoffee shall not be avoided, as shall be said hereafter in this chapter. And therefore the law here enableth the heir (of whom no mention was made in the condition) to perform the condition, lest the inheritance should be lost.

ALSO, it seemeth, (55) that in such case where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it, (56) the heirs of the feoffor may enter, &c. And the reason is, for that the executors represent the person of their testator, &c. (B 1).

LITTLETON.
[Sect. 337.
208 b.]
or his execu-
tors, &c.

"The person of the testator, &c." This is to be understood concerning goods and chattels either in possession or in action, and the executor doth more actually represent the person of the testator, than the heir doth the person of the ancestor; for if a man bindeth himself, his executors are bound though they be not named, but so it is not of the heir (c 1): *furthermore, here the administrators and ordinary also are implied, as before hath been said (1).

209 a.
(Post, 209 b.)

(2 Saund. 136.)
(43)*

So as now it appeareth, that either the heir of the feoffor, or his executors, may (when a day is limited) pay the money; and so also may the administrators of the feoffor do, if the feoffor die intestate; (w) and this may the ordinary do, if there be neither executor nor administrator, as hath been said.

(Ante, 206 a.)
Lib. 6. fol. 96.
97. Goodale's
case.

(w) Vid. sect.
334. (See
Hensloe's
case.
9 Rep. 36 b.)

BUT if a stranger of his own head, who hath not any interest, &c. will tender the aforesaid (57) money to the feoffee at the day appointed, the feoffee is not (58) bound to receive it.

LITTLETON.
[Sect. 334.
206 a.]

Nota, by this period and the (&c.) it is implied, that if the mortgagor die, his heir within age of fourteen years (the land being holden in socage), the next of kin to whom the inheritance cannot descend, being his guardian in socage, may tender in the name of the heir, because he hath an interest as guardian in socage. Also, if the heir be within age of twenty-one years, and the land is holden by knight-service, the lord of whom the land is holden may make the tender for his interest which he shall have when the condition

206 b.
Secus as to a
stranger.
Vid. sect. 401.
Hill. 28 Eliz.
in Banco Regis,
inter
Watkins &
Astwick pro
terris in
Com. Devon.
45 E. 3. tit.
Release 28.
32 E. 1. tit.
Annuity 51.

(55) *que* not in L. and M. and Roh.

(57) *avantdits* not in L. and M. but in Roh.

(56) *donques* added in L. and M. and Roh.

(58) *pas* not in L. and M. but in Roh.

(s 1) As to the person to whom mortgage money is to be paid, see the note to fol. 209 b. post.—[Ed.] [And see Mr. Butler's note at the end of the volume. Note 6.]

(c 1) See acc. *Barber v. Fox*, 2 Saund. 136. *Hunt v. Swain*, 1 Lev. 165. *Crosseing v. Hamor*, 1 Vern. 180. So the heir is not bound by deed, unless expressly named. Sheph. T. 178. But in case of debts due to the king, the heir is bound though not named in the bond or other specialty. See stat. 33 H. 8. c. 39. s. 66.—[Ed.]

(i) See Mr. Butler's note at the end of the volume. Note 7.

32 H. 6. 13.
(1 Leon. 34.
Moore 222.
Post, 225 b.
226 a.)

Unless the
heir be an
idiot.

is performed; for these, in respect of their interest, are not accounted strangers.

But if the heir be an idiot, of what age soever, any man may make the tender for him in respect of his absolute disability; and the law in this case is grounded upon charity, and so in like cases.

36 H. 6. tit.
Barre 166.
33 E. 1. tit.
Annuitie 51.
33 E. 3.
Judgment
254. (Ante,
160 b. Post,
245 a. 258 a.)

*207 a.

And note, that Littleton saith, that he is not bound to receive it at a stranger's hand. But if any stranger in the name *of the mortgagor or his heir (without his consent or privy) tender the money, and the mortgagee accepteth it, this is a good satisfaction, and the mortgagor or his heir agreeing thereunto may re-enter into the land, *omnis rati habitio retrò trahitur et mandato æquiparatur*. But the mortgagor or his heir may disagree thereunto if he will.

(44)*
LITTLETON.
[Sect. 336.
207 b.]
Condition to
have fee on
payment of
money by a
day certain,
may be per-
formed by the
feoffee's
alienee;

or by the first
feoffee.

*208 a.

207 b.
12 E. 3. Con-
dic. 8. 13 E. 3.
Ibid. 10. 12
Ass. 5. Plö.
481.
(5 Rep. 117.)

Lib. 5. fol. 96.
97. Goodale's
case.

*ALSO, if a feoffment be made on this condition, that if the feoffee pay to the feoffor at such a day between them limited £20, (59) then the feoffee shall have the land to him and to his heirs; and if he fail to pay the money at the day (60) appointed, (61) that then it shall be lawful for the feoffor or his heirs to enter, &c. and afterwards, before the day appointed, the feoffee sell the land to another, and of this maketh a feoffment to him, in this case if the second feoffee will tender the sum of money at the day appointed to the feoffor, and the feoffor refuseth the same, &c. then the second feoffee hath an estate in the land clearly without condition. And the reason is, for that the second feoffee hath an interest in the condition for the safeguard of (62) his tenancy. And in this case it seems, that if the first feoffee, after such sale of the land, will tender the *money at the day appointed, &c. to the feoffor, this shall be good enough for the safeguard of the estate of the second feoffee, because the first feoffee was privy to the condition, so the tender of either of them two is good enough, &c.

“And if he fail to pay the money, &c.” If a man make a feoffment of lands, to have and to hold to him and his heirs, upon condition, that if the feoffee pay to the feoffor at such a day twenty pounds, that then the feoffee shall have the lands to him and his heirs, if the condition had not proceeded further, it had been void, for that the feoffee had a fee-simple by the first words, and therefore the words subsequent are materially added, “and if he fail to pay the money, &c.”

(8 Rep. 42 b.)
(2 Cro. 9. 245.)
Lib. 5. fol. 114.
115. Wade's
case.

Albeit the second feoffee be not named in the condition, yet shall he tender the sum, because he is privy in estate, and in judgment of law hath an estate and interest in the condition, (as Littleton here saith) for the salvation of his tenancy. Vid. sect. 334. And note, he that hath an interest in the condition on one side, or in the land on the other, may tender.

(59) *que* added in L. and M. and Roh.

(60) *assesse* &c. L. and M.

(61) *que* added in Roh. but not in L. and M.

(62) *son-le* L. and M. and Roh.

"*The first feoffee.*" Here it appeareth, that the first feoffee may, notwithstanding his feoffment, pay the money to the feoffor, because he is party and privy to the condition, and by *his tender may save the estate of his feoffee, which in all good dealing he ought to do (D 1). 208 a. (45)*

*ALSO, if a feoffment be made upon condition, that if the feoffor pay a certain sum of money to the feoffee, then it shall be lawful to the feoffor and his heirs to enter (63): in this case, if the feoffor die before the payment made, and the heir will tender to the feoffee the money, such tender is void, because the time within which this ought to be done is past. For when the condition is, that if the feoffor pay the money to the feoffee, &c. this is as much to say, as if the feoffor during his life pay the money to the feoffee, &c. and when the feoffor *dieth, then the time of the tender is past. But otherwise it is where a day of payment is limited, and the feoffor die before the day, then may the heir tender the money, as is aforesaid; for that the time of the tender was not past by the death of the feoffor.* LITTLETON. [Sect. 337. 208 a.] But where no day of payment is appointed, on mortgagor's death, his heir cannot perform the condition. *208 b.

This diversity is plain and evident, and agreeth with (x) our books, and yet somewhat shall be observed hereupon: for here it appeareth, that seeing no time is limited, the law doth appoint the time, and that is, during the life of the feoffor (E 1): wherein divers diversities are worthy the observations. 208 a. In respect of time. No time being limited, feoffor has during life to perform the condition. (x) 14 H. 7. 31. (2 Co. 70.)

15 H. 7. 1. (Ante, 47. Post, 219 a. 2 Cro. 244.) (2 Co. 70.)

First, between this case that Littleton here putteth of the condition of a feoffment in fee, for the payment of money where no time is limited, and the condition of a bond for the payment of a sum of money where no time is limited: for, *in such a condition of a bond, the money is to be paid presently, that is, in convenient time. Secus in the case of bonds; 44 E. 3. 9. 33 H. 6. 45. & 49 b. 4 E. 4. 20. 9 E. 4. 22. 15 E. 4. 30. 21 E. 4. 38 b. 9 H. 7. 17 b. 10 H. 7. 15. 14 H. 8. 21 a. & 29 b. (46)*

2. (y) And yet, in case of a condition of a bond, there is a diversity between a condition of an obligation, which concerns the doing of a transitory act without limitation of any time, as payment of (y) Lib. 6. fol. 30. 31. Boothie's case. 33 H. 6. 47. 43. (1 Rol. Abr. 426.)

(63) &c. added in L. and M. and Roh.

(D 1) So any person who has an interest in the land may redeem a mortgage. The doctrine of redemption of estates in mortgage was briefly considered in a former note. Ante, n. (x), p. 39—41. For a full explanation of this interesting subject, the student is referred to Mr. Powell's Treatise of Mortgages, v. 1. c. 10. p. 337. Bac. Abr. tit. Mortgage (E). Com Dig. Chancery (4 A. 4.). Vin. Abr. Mortgage (Q). See also the note to fol. 209 b. post, where some observations will be found as to the payment of the mortgage money. With respect to the effect of outstanding terms in barring dower, see ante, vol. 1. p. 618. n. (x 1) chap. 19. Of Dower, and the case of *Maundrell v. Maundrell* there cited.—[Ed.]

(x 1) The feoffor has time during his life to pay the money, because the other has the profit of the land, and has no loss by non-payment; but, on the other side, if the condition be, that the feoffee shall pay money to the feoffor, it must be paid in convenient time; for it is not reasonable that the feoffee should have the benefit of the land without payment. 2 And. 73.—[Ed.]

*208 b.
(6 Rep. 31.
Boothie's
case. Post,
210b.)

money, delivery of charters, or the like, for there the condition is to be performed presently, that is, in convenient time; and when by the condition of the obligation the act that is to be *done to the obligee is of his own nature local, for there the obligee (no time being limited) hath time during his life to perform it, as to make a feoffment, &c. if the obligee doth not hasten the same by request.

(2 Rol. Abr.
436. 437.)

(*) Boothie's
case, ubi su-
pra. (Doc.
Pla. 268. 457.)

3. In case where the condition of the obligation is local, there is also a diversity, when the concurrence of the obligor and the obligee is requisite, (as in the said case of the feoffment) and when the obligor may perform it in the absence of the obligee, as to knowledge satisfaction in the court of king's bench (*), although the knowledge of satisfaction is local, yet, because he may do it in the absence of the obligee, he must do it in convenient time, and hath not time during his life.

4. Another diversity is, where the condition concerneth a transitory or local act, and is to be performed to the feoffee or obligee, and where it is to be performed to a stranger: as if A. be bound to B. to pay 10 pounds to C.; A. tenders to C., and he refuseth, the bond is forfeited, as in this section shall be said more at large.

or where the
condition is
to be per-
formed to a
stranger.
(Vid. ante,
sect. 324.)
Boothie's
case, lib. 6.
fo. 31. lib. 2.
fo. 79 b.
Seignior
Cromwell's
case. 44 E. 2.
9. 21 E. 4. 41.
2 E. 4. 3. 4.
19 H. 6. 67. 73.
76. 4 E. 4. 4 b.
26 H. 8. 9 b.
(3 Rep. 59.
218.)

5. Another diversity is between a condition of an obligation, and a condition upon a feoffment; where the act that is local is to be done to a stranger, and where to the obligee or feoffor himself. As if one make a feoffment in fee, upon condition that the feoffee shall infeoff a stranger, and no time limited, the feoffee shall not have time during his life to make the feoffment, for then he should take the profits in the mean time to his own use, which the stranger ought to have, and therefore he ought to make the feoffment as soon as conveniently he may; and so it is of the condition of an *obligation. But if the condition be, that the feoffee shall reinfeoff the feoffor, there the feoffee hath time during his life, for the privity of the condition between them, unless he be hastened by request, as shall be said hereafter.

(Vid. post,
sect. 352, 353,
354.)

6. Another diversity is, when the obligor or feoffor (A) is to infeoff a stranger, as hath been said, and when a stranger is to infeoff the feoffee or obligee: as if A. infeoff B. of Black Acre, upon condition that if C. infeoff B. of White Acre, A. shall re-enter, C. hath time during his life, if B. doth not hasten it by request, and so of an obligation.

14 E. 3. Det.
133 lib. 2.
fol. 60. Seig-
nior Crom-
well's case.

7. But in some cases albeit the condition be collateral, and is to be performed to the obligee, and no time limited, yet, in respect of the nature of the thing, the obligor shall not have time during his life to perform it. As if the condition of an obligation be, to grant an annuity or yearly rent to the obligee during his life, payable yearly at the feast of Easter, this annuity or yearly rent must be

(A) *Instead of feoffor, the word feoffee is used in the 7th Edition, as the sense appears to require. [Note to 8th Edition. Lond. 1823.]*

granted before Easter, or else the obligee shall not have it at that feast during his life, *et sic de similibus*; and so was it resolved by the judges (*) of the common pleas in the argument of Andrews' case, which I myself heard.

(*) Vid. Dyer. 14 El. 311. 6 Rep. Booth's case.)

8. Lastly, when the obligor, feoffor, or feoffee, is to do a sole act or labour, as to go to *Rome, Jerusalem, &c. in such and the like cases, the obligor, feoffor, or feoffee, hath time during his life, and cannot be hastened by request. And so it is, if a stranger to the obligation or feoffment were to do such an act, he hath time to do it any time during his life.

*209 a.

ALSO, (64) upon such case of feoffment in mortgage, a question hath been demanded in what place the feoffor is bound (65) to tender the money to the feoffee at the day appointed, &c. And some have said, upon the land so (66) holden in mortgage, because the condition is depending upon the land. And they *have said, (67) that if the feoffor be (68) upon the land there ready to pay the money to the feoffee at the day set, and *the feoffee be not then there, (69) then the feoffor is quit and excused of the payment of the money, for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him; for he is bound to seek the feoffee if he be then in (70) any other place within the realm of England. As if a man be bound in an obligation of 20 pound upon condition indorsed upon the same obligation, that if he pay to him, to whom the obligation is made, at such a day 10 pound, (71) then the obligation of 20 pound shall lose his force, and be holden for nothing; in this case it behoveth him that made the obligation to seek him to whom the obligation is made, if he be in England, and at the day set to tender unto him the said 10 pound, otherwise he shall forfeit the sum of 20 pound comprised within the obligation (72), &c. And so it seemeth in the other case, &c. And albeit that some have *said that the condition is depending upon the land, yet this proves not that the making of the condition to be performed ought to be made upon the land, &c. no more than if the condition were that the feoffor at such a day shall do some special corporal service to the feoffee, not naming the place where such corporal service shall be done. In this case the feoffor ought to do such corporal service at the day limited to the feoffee, in what place soever of England that the feoffee be, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seems to them, that it shall be more properly said, that the estate of the land is depending upon the condition, (73) than (74) to say that the condition is depending upon the land, &c. Sed quære, &c.

LITTLETON. [Sect. 340. 210 a.] In respect of place. Condition to pay a sum in gross, no place being appointed, must be performed to the feoffee in person.

210 b. (48)

*211 a.

(64) *sur-en* L. and M. and Roh.

(65) *de-a* L. and M. and Roh.

(66) *tenus* not in L. and M.

(67) *que* not in L. and M. but in Roh.

(68) *sur le terra la*, not in L. and M. nor Roh.

(69) *que* added in L. and M. and Roh.

(70) *ascun-un*, L. and M. and Roh.

(71) *que* added in L. and M. and Roh.

(72) *&c.* not in L. and M. but in Roh.

(73) *&c.* added in L. and M. and Roh.

(74) *est a tant*, added in L. & M. and Roh.

§10 a.
(*) Vid. sect.
170. 302. 375.
(z) 6 E. 4. 4.
& 14. 11 H. 4.
62. 17 Ass.
p. 2. 17 E. 3. 2.
21 H. 7. Keyl-
way 74.
16 Eliz.
Dyer 327. lib.
4. fol. 73. in
Borough's
case. 21 E. 4.
6. 6 Rep. 36.
(2 Cro. 423.
3 Cro. 685.)

Here and in other places, that I may say once for all, where Littleton maketh a doubt, and setteth down several opinions and the reasons, he ever setteth down (*) the better opinion and his own last, and so he doth here. (z) For at this day this doubt is settled. having been oftentimes resolved, that seeing the *money is a sum in gross, and collateral to the title of the land, that the feoffor must tender the money to the person of the feoffee according to the latter opinion, *and it is not sufficient for him to tender it upon the land: otherwise it is of a rent that issueth out of the land.

(49)*
§210 b.

LITTLETON.
[Sect. 341.
211 b.]
Secus in the
case of a
rent;

BUT if a feoffment in fee be made, reserving to the feoffor a yearly rent, and for default of payment a re-entry, &c. in this case (75) the tenant needeth not tender the rent, when it is behind, but upon the land, because this is a rent issuing out of the land, which (76) is a rent seck. For if the feoffor be seised once of this rent, and after he cometh upon the land, &c. and the rent is denied him, he may have an assise of Novel Disseisin. For albeit he may enter by reason of the condition broken, &c. yet he may choose either to relinquish his entry, or to have an assise, &c. And so there is a diversity, as to the tender of a rent which is issuing out of the land, and of the tender of another sum in gross, which is not issuing out of any land (v 1).

§211 b.

Here the diversity appeareth between a sum in gross, and a rent issuing out of the land, as hath been touched before.

§210 b.
§211 a.
21 E. 3. 10.
20 H. 6. 31.
27 E. 3. 34.
21 Ass. 13.
7 E. 4. 4.
21 E. 4. 17.
20 E. 3.
Avowrie 113.
45 E. 3. 9.
46 E. 3.

Barre 216. Mich. 22 & 23 Eliz. in Bank le Roy, which I myself heard and observed. 19 Eliz. Dier 354. lib. 8. fol. 92. in Frances' case. (Cro. Jac. 9.)

There is a diversity between a rent issuing out of land, &c. and a corporal service issuing out of land, for it sufficeth (as hath been *said) that the rent be tendered upon the land (77), out of which it issueth. But homage or any other special corporal service must be done to the person of the lord, and the tenant ought by the law of conveniency to seek him to whom the service is to be done, in any place within England.

(75) a added in L. and M. and Roh.

for there no acceptance of rent afterwards

(76) ceo added in L. and M. and Roh.

can make it have continuance. Post, 215 a."

(77) "Otherwise when the lease is void; —Lord Nott MS.

(v 1) So in a modern case it was held, that a portion secured, under a marriage-settlement, on lands in Ireland, ought to be paid in England where the contract was made and the parties resided, and not in Ireland where the lands lay; and the decision of the court was grounded on the above distinction taken by Littleton between a sum in gross and a rent issuing out of land. *Phipps v. Earl of Anglesea*, 5 Vin. Abr. 209. pl. 8. 1 P. Wms. 696.—[Ed.] [If A. recites by his deed, that whereas he is indebted to B. in £100, and he covenants with B. that the £100 shall be paid and delivered to B. or his assigns at Rotterdam in Holland, by C. without any suit at law, upon the first requisition that shall be made of it; in this case, the demand may be in any other place beside Rotterdam: for though payment is to be made at Rotterdam, yet the demand may be made at any place and if the demand be made in England, or at Dort, which is 10 miles from Rotterdam, it is good, for he ought to have reasonable time to pay it after the demand, having respect to the distance of the place. But if the demand should be limited to Rotterdam, perhaps he would never come there, and so the covenant would be of no effect.—Mich. 1650, between Hasted and Vanleyden, adjudged upon a special verdict. 1 Roll. Abr. 443.—In *Brownlow*, 46 it is laid down, that if money be appointed by will to be paid, and no place limited for the payment, there must be a request to pay the money, and the executor is not bound to seek him to whom it is to be paid. *Butler*, Note 109.]

"*Within the realm of England.*" (G 1) For if he be out of the realm of England he is not bound to seek him, or to *go out of the realm unto him. And for that the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition.

(56)*
210 b.
or if the feoffee be out of the kingdom

But if the condition of a bond or feoffment be to deliver twenty quarters of wheat, or twenty load of timber, or such like, the obligor or feoffor is not bound to carry the same about and seek the feoffee, but the obligor or feoffor before the day must go to the feoffee, and know where he will appoint to receive it, and there it must be delivered. And so note a diversity between money and things ponderous, or of great weight. If the condition of a bond or feoffment be to make a feoffment, there it is sufficient (a) for him to tender it upon the land, because the state must pass by livery.

or if the condition be to deliver a thing ponderous;
18 E. 4. 2.
19 E. 2.
Det. 173.
(Ante, 206 b. 207 a.)
(1 Rol. 453.)
(Ante, 206.)
or to make a feoffment.
(a) 2 E. 4. 2.

*AND, therefore, it will be a good and sure thing for him that will make such feoffment in mortgage, to appoint a special place (H 1) where the money shall be paid, and the more special that it be put, the *better it is for the feoffor. As if A. infeoff B. to have to him and to his heirs, upon such condition that if A. pay to B. on the feast of St. Michael the Archangel, next coming, in the cathedral church of St. Paul's in London, within four hours next before the hour of noon of the same feast, at the rood loft of (78) the rood of the north door, within the same church, or at the tomb of St. Erkenwald, (this Erkenwald was a younger son of Anha, king of the East Saxons, and was first abbot of Chertsey, in Surrey, which he had founded, and after bishop of London, a holy and devout man, and lieth buried in the south aisle, above the quire in St. Paul's church, where the tomb yet remaineth, that Littleton speaketh of in this place: he flourished about the year of our Lord 690;) or at the door of such a chapel, or at such a pillar, within the same church, that then it shall be lawful to the aforesaid A. and his heirs to enter, &c. in this case he needeth not to seek the feoffee in another place, nor to be in any other place, but in the place comprised in the indenture, nor to be there longer than the time specified in the same indenture, to tender or pay the money to the feoffee, &c.*

LITTLETON.
[Sec. 342.
211 b.]
But where a certain place is appointed, condition must be performed there.
*212 a.

[COKE,
212 a.]

(1 Rol. Abr.
445, 446.)

(2 Cro. 13. 14.)

Here is good counsel and advice given, to set down in conveyances every thing in certainty and particularity, for certainty is the mother

212 a.

(78) *le Rood de le*, not in L. and M. nor Roh.

(G 1) See n. (11) post, p. 51.—[Ed.]

(H 1) A tender must be strictly made, in order to stop interest on a mortgage. *Bishop v. Church*, 2 Ves. 372. *Garforth v. Bradley*, 2 Ves. 678. *Shrapnell v. Blake*, 2 Ab. Eq. 603. Et vid. *Wiltshire v. Smith*, 3 Atk. 90. And if the tender be insisted on to stop interest, the money must be kept dead from that time, because the party is to be *uncore prist*. *Gyles v. Hall*, 2 P. Wms. 378. But where money is lent in town, and six month's notice to pay the mortgage money at Lincoln's Inn Hall (though this be not the place named in the proviso) is given, and no objection made to the notice, a personal tender, it seems, will be dispensed with. *Ibid.*—[Ed.]

of quietness and repose, and uncertainty the cause of variance and contentions: and for obtaining of the one, and avoiding of the other, the best mean is, in all assurances, to take counsel of learned and well experienced men, and not to trust only, without advice, to a precedent. For as the rule is concerning the state of a man's body, *Nullum medicamentum est idem omnibus*, so in the state and assurance of a man's lands, *Nullum exemplum est idem omnibus*.

The residue of this section and the &c. are evident.

LITTLETON.
[Sect. 343.
212 a.]
Though it
may be per-
formed in an
other place,
by consent.
*212 b.

*ALSO, in such case, where the place (79) of payment is limited, the feoffee is not (80) bound to receive the payment in any other place, but in the same place so limited. *But yet if he do receive the payment in another place, this is good enough, and as strong for the feoffor as if the receipt had been in the same place so limited, &c. (11).*

(6 Rep. 46 b.
47. Flo. 69 b.
5 Rep. 117.)

*212 b.

Hereby it appeareth, that the place is but a circumstance; and, therefore, if the obligee receiveth it at any other place, it is sufficient, though he be not bound to receive it at any other place. *And so it is if the money be to be paid on such a feast, yet if the money be tendered and received at any time before the day, it is sufficient (81).

*211 a.
Where the
place is cer-
tain, and the
time uncer-
tain, notice
of perform-
ance must be
given.

(1 Bol. Abr.
463. Ante.
206. 210.)

If a man be bound to pay twenty pound at any time during his life at a place certain, the obligor cannot tender the money at the place when he will, for then the obligee should be bound to perpetual attendance, and therefore the obligor, in respect of the uncertainty of the time, must give the obligee notice, that on such a day, at the place limited, he will pay the money, and then the obligee must attend there to receive it: for if the obligor then and there tender the money, he shall save the penalty of the bond for ever (κ 1).

18 Eliz.
Dyer 354.

(2 Rep. 69.
3 Rep. 64.)

The same law it is if a man make a feoffment in fee upon condition, if the feoffor at any time during his life pay to the feoffee twenty pound at such a place certain, that then, &c. In this case

(79) *de payment*, not in L. and M. nor Roh.

(80) *pas* added in L. and M. and Roh.

(81) It has been formerly doubted, whether the defendant in such a case ought not to plead specially. See 1 Cro. 142. S. C. And. 198. S. C. Mo. 267. S. C. Ow. 45. Savil. 96. 1 Leon. 311. But now this point is settled; for by 4 Ann. cap. 16. s. 12. if the obligor, his heirs, executors, and adminis-

trators have, before the action brought, paid to the obligee, his executors, or administrators, the principal and interest due by the condition of the bond, though such payment was not strictly made according to the condition, yet it may be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place, according to the condition, and had been so pleaded. [Note to the 11th edition.]

(11) If a condition be to do an act at such a place upon request, the request may be in any place: as if it be, to deliver at Rotterdam *super requisitionem de eodem*; the request in any other place, to deliver there, is good. Rol. Abr. 443. 3 Com. Dig. 104. tit. Condition (e 9).—[Ed.]

(κ 1) But where the giving of notice becomes impossible by the act of the person to whom it was to be given, it will be dispensed with. 1 Salk. 214.—[Ed.]

the feoffor must give notice to the feoffee when he will pay it, for without such notice as aforesaid, the tender will not be sufficient. But, in both these cases, if at any time the obligor or feoffor meet the obligee or feoffee at the place, he may tender the money.

(3 Rep. 92.
Post, sect. 353.
2 Cro. 9. 10.)

If A. be bound to B. with condition that C. shall enfeoff D. on such a day, C. must give notice to D. thereof, and request him to be on the land at the day to receive the feoffment, and in that case he is bound to seek D. and to give him notice.

(Hob. 51.
1 Rol. Abr.
453. 2 Cro. 9.)

*ALSO, if the feoffee in mortgage, before the day of payment which should be made to him, makes his executors and die, and his heir entereth in to the land as he ought, &c. it seemeth, in this case, that the feoffor ought to pay the money at the day appointed to the executors (L 1), and not to the heir *of the feoffee,*

LITTLETON.
[Sect. 339.
209 b.]
In respect of
the person to
whom it is to
(53)*

(L 1) "By the common law," says Lord Keeper Finch, in his masterly argument in the case of *Thornborough v. Baker*, "if the condition or defeazance of a mortgage of inheritance, be so penned, that no mention is made either of heirs or executors to whom the money should be paid, in that case the money ought to be paid to the executor, in regard that the money came first out of the personal estate, and therefore usually returns thither again; but if the defeazance appoints the money, to be paid either to heirs or executors disjunctively, there, by the law, if the mortgagor paid the money precisely at the day, he may elect to pay it either to the heirs or executors as he pleaseth. But where the precise day is past, and the mortgage forfeited, all election is gone in law; for in law there is no redemption. Then, when the case is reduced to an equity of redemption, that redemption is not to be upon payment to the heir or executors of the mortgagee, at the election of the mortgagor; for it were against equity to revive that election; for then the mortgagor might defer the payment as long as he pleaseth, and, at last, compound for payment of the money to that hand which will use him best; much less can the court elect or direct the payment as they please, for a power so arbitrary might be attended with many inconveniences throughout. Therefore, to have a certain rule in those cases, a better cannot be chosen, than to come as near unto the rule and reason of the common law as may be. Now the law always gives the money to the executor, where no person is named, and where the election to pay either heir or executor is gone and forfeited in law, it is all one in equity as if neither heir nor executor were named; and then equity ought to follow the law, and give it to the executor; for, in natural justice and equity, the principle right of the mortgagee is to the money, and his right to the land is only as a security for the money. Wherefore, when the security descends to the heir of the mortgagee, attended with an equity of redemption, as soon as the mortgagor pays the money the lands belong to him, and only the money to the mortgagee, which is merely personal, and so accrues to the executors or administrators of the mortgagee. And for this reason, a mortgage of an inheritance to a citizen of London hath been held to be part of his personal estate, and divided according to custom. And though it may seem hard that the heir should part with the land, and he decreed to make a conveyance, without having the money which comes in lieu of the land, yet it will not seem so to them who consider that the land was never more than a security, and that, after payment of the money, the land is in trust for the mortgagor, which the heir of the mortgagee is bound to execute; and his lordship declared, that the right to a sum of money, which is a personal duty, ought always to be certain, and not to be variable upon circumstances. Wherefore his lordship did not think it material that the administrator in this case had assets without this money; for assets, or not assets, is not the measure of justice to executor or administrator, but serves only as a pretence to favour the heir, who either ought to have the money, if there be no assets, or not to have it, though there be assets. And, for the same reason, his lordship did not think it material, that there wanted the circumstance of a personal covenant from the mortgagor to pay the money; for that, though the case of the administrator of the mortgagee had been stronger with it, yet it is strong enough without it. His lordship declared, that he had considered the various precedents in this case which had been urged, whereof one did not come to the very point, there being a great difference between a mortgage and an absolute conveyance, with a collateral agreement to reconvey upon repayment of the purchase money; the other late pre-

be performed.

(54)*
Mortgage money to be paid to the executors, and not to the heir.

(55)*
(56)*

Secus if it be expressly made payable to the heir.

*because the money at the beginning trenched to the feoffee in manner as a duty, and shall be intended *that the estate was made by reason of the lending of the money by the feoffee, or for some other duty; and therefore the *payment shall not be made to the heir, (82) as it seemeth, but words of the condition may be such, as the payment shall *be made to the heir. As if the condition were, that if the feoffor pay to the feoffee or his heirs, such a sum at such a day, &c. there after the death of the feoffee, if he dieth before the day limited, (83) the payment ought to be made to the heir at the day appointed, &c.*

209 b.
(Ante, 208 a.
9 Rep. 39.)
*210 a.

And by this section also it appeareth, that the executors do more represent the person of the testator, than the heir doth to the ancestor; for, though the executor be not named, yet the *law appoints

(82) *come il semble, mes les parols del condition poyent estre tels, que le payment serra fait al heire*, not in L. and M. nor Roh.

(83) *donques* added in L. and M. and Roh.

cedents which made for the heir being contrary to the more ancient precedents of this court, and to some modern precedents also, which seemed to his lordship of more weight, his lordship being of opinion, that all mortgages ought to be looked upon as part of the personal estate, unless the mortgagee, in his life-time, or by his last will, do otherwise declare and dispose of the same." 1 Ch. Ca. 283. Et vid. 2 Ch. Ca. 50, 51. 187. 224. 2 Vent. 348. 351.

With respect to the payment of the mortgage money, it may be further observed, that, where the mortgagor dies leaving a real and personal estate, without specifically charging either of them with the payment of the money borrowed, his personal estate shall be first applied towards the payment of the mortgage; because the personal estate was increased by the money borrowed: and, therefore, it is a general rule, that the executor of a mortgagor is compellable to redeem a mortgage for the benefit of the heir, even though there should be no covenant for the payment of the mortgage money. *Cope v. Cope*, 2 Salk. 449. *Howell v. Price*, 1 P. Wms. 291. *Gower v. Mead*, Prec. Ch. 2. And this rule holds in favour of a general devisee or *hæres factus*, as well as in favour of a *hæres natus*. *Pockley v. Pockley*, 1 Vern. 36. *King v. King*, 3 P. Wms. 359. And a devisee of particular lands is in like manner entitled to the benefit of redemption by the personal estate. *Popley v. Popley*, 2 Ch. Ca. 84. 1 Atk. 436. A disposition of the personal estate will not alter this rule; for the court will suppose the intention of the testator to have been, to bequeath only the residue of his personal estate, after payment of debts, unless a contrary intention evidently appears. *Noke v. Darby*, 1 Bro. P. C. 506. And where a testator charges his lands with the payment of his debts, this will not exonerate his personal estate; for such a charge can only be intended for the purpose of creating an additional fund, in case the personal estate should not be sufficient. *Cook v. Gwavas*, cited 9 Mod. 187. *Bridgeman v. Dove*, 3 Atk. 101. *Ancoaster v. Mayer*, 1 Bro. C. C. 454. *Lavell v. Lancaster*, 2 Vern. 183. It must be an intention not only to charge the real estate, but to discharge the personal. *Bootle v. Blundell*, 1 Meriv. 193. Where the personal estate is deficient, the lands devised for payment of debts will be applied in discharge of the money due on mortgage. *Bartholomew v. May*, 1 Atk. 487. *Serle v. St. Eloy*, 2 P. Wms. 386 n. *Galton v. Hancock*, 2 Atk. 424. But a testator may exempt his personal estate from the payment of money due on mortgage, by substituting his real for his personal estate. *Hall v. Broker*, Gilb. Rep. 72. *Walker v. Jackson*, 2 Atk. 624. *Bamfield v. Wyndham*, Prec. Ch. 101. *Wainwright v. Bendlowes*, 2 Vern. 718. *Stapleton v. Colvill*, Forrest, 202. *Leman v. Newnham*, 1 Ves. 51. *Duke of Ancaster v. Meyer*, 1 Bro. C. C. 454. *Burton v. Knowlton*, 3 Ves. 107. *Brummell v. Prothero*, 3 Ves. 111. A specific disposition of a chattel will exonerate it from being applied in payment of money due on mortgage. *Oneal v. Mead*, 1 P. Wms. 693. And although, generally, the personal estate is to be first applied in payment, yet the rule is otherwise, where the charge was originally on the real estate; for, in such case, the mortgage must be paid out of the land itself; for the collateral personal security is not to be resorted to, until the principal, which is the land, fails. *Countess of Coventry v. Earl of Coventry*, 2 P. Wms. 222. *Edwards v. Freeman*, 2 P. Wms. 437. *Wilson v. Earl of Darlington*, 2 P. Wms. 664 n. *Leman v. Newnham*, supra. *Ward v. Dudley*, 2 Bro. C. C. 316.

him to receive the money, but so doth not the law appoint the heir to receive the money unless he be named.

Lewis v. Nangle, Ambl. 150. *Duke of Lancaster v. Meyer*, supra. So where the debt, although personal in its nature, was contracted originally by another, as where an estate is bought subject to a mortgage, the personal estate of the purchaser shall not be applied in exoneration of the real estate, (*Tweddell v. Tweddell*, 2 Bro. C. C. 101.), unless the purchaser appear to have intended to make the debt his own (*Pockley v. Pockley*, supra. *Earl of Belvidere v. Rochfort*, 6 Bro. C. C. 520. *Billinghurst v. Walker*, 2 Bro. C. C. 608); but a mere covenant for securing the debt will not be sufficient for such purpose. *Evelyn v. Evelyn*, 2 P. Wms. 664. *Forester v. Leigh*, Ambl. 171. *Earl of Tankerville v. Fawcett*, 2 Bro. C. C. 57. *Tweddell v. Tweddell*, 2 Bro. C. C. 152. *Billinghurst v. Walker*, 2 Bro. C. C. 604. 2 Fonb. Tr. Eq. 287 n. Where a wife's estate is mortgaged for the benefit of the husband, she has, if she survives, a right, after all his debts are paid, to stand as a creditor against his assets, *Tate v. Austin*, 1 P. Wms. 264. 2 Vern. 689. 1 Bro. P. C. 1. (unless at the time of the mortgage a settlement is made on the wife, *Lewis v. Nangle*, supra.); but evidence is admissible to show that the wife intended otherwise. The title of the wife to be exonerated is considered, as precisely the same with that of the heir. *Clinton v. Hooper*, 3 Bro. C. C. 201. 1 Ves. jun. 173. But if the mortgage of the wife's estate is not for the husband's debts, or for debts due from the wife *dum sola* (*Lewis v. Nangle*, supra.), his assets, though he join in the mortgage, are not liable. *Bagot v. Oughton*, 1 P. Wms. 347. And where the wife has the absolute disposal of the money, and appropriates it to the use of the husband, the husband's assets are not liable. *Clinton v. Hooper*, supra. On the same principle, if a father, tenant for life, and his son, join in raising money, which is received by the father, he is bound to exonerate the son's estate from the incumbrance, *Piers v. Piers*, 1 Ves. 522. 1 Mad. Ch. 472.; and the son is entitled in equity to rank as a creditor on the real and personal assets of his father for the money, and to call on the mortgagee to make the utmost of his mortgage for the son's relief. *Rosse v. Sterling*, 4 Dow. 442.

With respect to the order in which mortgages are to be paid:—It is a rule, that mortgages are to be paid according to the priority of their respective dates, 1 Vern. 525.: but statutes, judgments, and recognizances are, in equity, regarded equally with mortgages. *Symes v. Symes*, 4 Bro. P. C. 328. 1 Ab. Eq. 142. 2 P. Wms. 495. Where incumbrances are merely equitable, a mortgage of the legal estate to a person without notice, will give him a priority. But if any of the equitable incumbrances are excepted, the mortgagee will be considered as a trustee for them. *Ingraham v. Pelham*, Ambl. 153. In case of fraud on the part of the first mortgagee, the subsequent incumbrances will be preferred. *Draper v. Borlace*, 2 Vern. 370. *Beresford v. Milward*, 2 Atk. 49. But when the party to whom the fraud is imputed was not consensant of the treaty in which the fraud was practised, nor in any manner, nor for any fraudulent purpose, confederating with the party practising the fraud, this principle does not apply. See *Ibbotson v. Rhodes*, 2 Vern. 554. *Pasley v. Freeman*, 3 T. R. 51. Whether the mere circumstance of the first mortgagee being a witness to the second mortgage shall be sufficient to postpone him, see *Mocatta v. Murgatroyd*, 1 P. Wms. 393. *Becket v. Cordley*, 1 Bro. C. C. 353. Dig. lib. 13. t. 739. Domat's Civil Law, b. 3. t. 1. s. 15. p. 365. That a voluntary leaving of the title deeds with the mortgagor, will postpone the first mortgagee, on the ground that he has thereby enabled the mortgagor to practise a fraud, see *Goodtitle v. Morgan*, 1 T. R. 762. Treat. of Eq. b. 1. c. 3. s. 4. But there must be a voluntary and unjustifiable concurrence on the part of the first mortgagee to postpone his priority. *Peter v. Russell*, 1 Ab. Eq. 321. *Penner v. Jemmett*, Fonb. Tr. Eq. b. 1. c. 3. s. 4. *Tourle v. Rand*, 2 Bro. C. C. 650. *Plumb v. Flint*, Anst. 432. *Evans v. Bicknell*, 6 Ves. jun. 174. A court of equity, however, will not take from the second mortgagee the title deeds, unless the first mortgagee pays him his money. *Head v. Egerton*, 3 P. Wms. 279. *Ex parte Kensington*, 2 Ves. & B. 83. Ant. n. (z), p. 39. That a prior mortgage, if defective, will not be preferred to a subsequent effective one to a person without notice, see 1 Ab. Eq. 320. *Ozwick v. Plumer*, 5 Bac. Ab. 43.: though it is otherwise as to creditors by judgment; for the defect of such conveyance will be supplied in equity against them, since they did not originally take the lands for their security. *Burgh v. Francis*, 1 Ab. Eq. 320. 5 Bac. Abr. 41. *Taylor v. Wheeler*, 2 Vern. 564.

To what was observed in a former note as to tacking, we may add, that it is a settled rule, that if a third mortgagee buys in the first mortgage, without notice (at the time of lending his money) of the second mortgage, he acquires a title in law, and having equal equity, shall have satisfaction before the second mortgagee, *Marsh v. Lee*, 2 Vent. 337. 1 Ch. Ca. 172. *Wortley v. Birkhead*, 2 Ves. 571.; though the third mortgagee buys in the first

And here it also appeareth, that if the condition upon the mortgage be to pay to the mortgagee or his heirs the money, &c. and before the day of payment the mortgagee dieth, the feoffor cannot pay the money to the executors of the mortgagee: for Littleton saith, that in this case the payment ought to be made to the heir. *Et in hoc casu designatio unius personæ est exclusio alterius, et expressum facit cessare tacitum*; and the law shall never seek out a person, when the parties themselves have appointed one. But if the condition be to pay the money to the feoffor his heirs or executors, then the feoffor hath election to pay it either (b) to the heir or executors.

(Vid. lib. 5.
fol. 96. Good-
ale's case.
Dier. 2 Eliz.
181. 44 E. 3.
1b. Ante,
47 a.)
In what cases
the mortga-
gor has elec-
tion to pay
either to the
executors or
heir;
(b) 12 E. 3.
Condition, 8.
& 10.

(8 Rep. 73.)

(1 Rol. Abr.
421.)

(Hob. 9.)
27 H. 8. 2, 3 &
4 Ph. & Marr.
140 a.

If a man make a feoffment in fee upon condition, that the feoffee shall pay to the feoffor, his heirs or assigns, twenty pounds at such a day, and before the day the feoffor make his executors and dieth, the feoffee may pay the same either to the heir or to the executors, for they are his assigns in law to this intent. But if a man make a feoffment in fee upon condition, that if the feoffor pay to the feoffee, his heirs or assigns, twenty pounds, before such a feast, and before the feast the feoffee maketh his executors and dieth, the feoffor ought to pay the money to the heir, and not to the executors, for the executors in this case are no assignees in law; and the reason of this diversity is this, for that in the first case the law must of necessity find out assigns, because there cannot be any assigns in deed, for the feoffor hath but a bare condition and no estate in the land which he can assign over. But in the other case the feoffee hath an estate in the land, which he may assign over; and where there may be assignees in deed, the law shall never seek out or appoint any assigns in law. And albeit the feoffee made no assignment of the estate, yet the executors cannot be assignees because assigns were only in-

mortgage, pending a bill, brought by the second mortgagee to redeem the first (*Hawkins v. Taylor*, 2 Vern. 29. *Turner v. Richmond*, 2 Vern. 81. 2 P. Wms. 491.), unless the suit has proceeded so far as to a decree, and a direction to settle priorities. *Wortley v. Birkhead*, supra. *Earl of Bristol v. Hungerford*, 2 Vern. 524. *Ex parte Knott*, 11 Ves. 619. But if a judgment or statute creditor, being the third incumbrancer, buy in the first mortgage, he cannot tack or unite this to his judgment, &c.; for he did not advance his money on the credit of the land: though if a third mortgagee buy in a statute, and hold both in the same right (*Harrel v. Paske*, 2 Atk. 52.), he is allowed to unite the statute to his third mortgage, because the land was in his view and contemplation when he lent the money. *Brace v. Duchess of Marlborough*, 2 P. Wms. 491. *Higgon v. Syddal*, 1 Ch. Ca. 149. *Hamerton v. Rogers*, 1 Ves. jun. 513. *Wynn v. Williams*, 5 Ves. 130. So if a first mortgagee lends a further sum to the mortgagor (*Mattheus v. Cartwright*, 2 Atk. 347.) upon a statute or judgment, he may retain not only against the mortgagor, but against a mesne mortgagee (provided he had no notice of such mesne mortgage), till both the mortgage and statute, or judgment, be paid. *Shepherd v. Tuttle*, 2 Atk. 352. *Jackson v. Langford*, 2 Ves. 662. And it has been decided, that a first mortgagee is entitled to tack, as against a second mortgagee, a subsequent judgment, docketed, though no execution had issued, at the time of the bankruptcy of the mortgagor. *Baker v. Harris*, 16 Ves. 399. And where a mortgage contains a clause that the lands shall be a security for further advances, a subsequent loan will be considered as part of the original transaction, and will have a priority over a second mortgage, though made subsequently thereto, and with notice. *Gordon v. Graham*, 7 Vin. Abr. 52. But a mortgagee is not permitted to tack, as against assignees in bankruptcy, a mortgage subsequent to an act of bankruptcy, though without notice, and previous to the commission, for by such mortgage no interest passes. *Archer v. Snatt*, 2 Stra. 1107. *Ex parte Knott*, 11 Ves. 686. *Ex parte Herbert*, 13 Ves. 183.—[Ed.]

tended by the condition to be assignees of the estate; and so was it resolved (*) *Mich. 23 & 24 Eliz.* by the two chief justices in the court of wards, between *Randall* and *Browne*, which I observed (84).

But if the condition be to pay the money to the feoffee, his heirs or assigns, and the feoffee make a feoffment over, *it is in the election of the feoffor to pay the money to the heir of the first feoffee, or to the second feoffee; and so if the first feoffee dieth, the feoffor may either pay the money to the heir of the first feoffee, or to the second feoffee; for the law will not enforce the feoffor to take knowledge of the second feoffment, nor of the validity thereof, whether the same be effectual or not, but at his pleasure; and the first feoffee and his heirs are expressly named in the condition.

"*Pay such a sum at such a day, &c.*" Here is implied, that this payment ought to be real, and not in show or appearance. For if it be agreed between the feoffor and the executors of the feoffee, that the feoffor shall pay to the executors but part of the money, and that yet in appearance the whole sum shall be paid, and that the residue shall be repaid; and accordingly at the day and place the whole sum is paid, and after the residue is repaid; this is no performance of the condition; for the state shall not be divested out of the heir, which is a third person, without a true and effectual payment, and not by a shadow or colour of payment, and the agreement precedent doth guide the payment subsequent.

Note, that in a condition consisting of divers parts in the conjunctive, as in the case of Littleton, (sect. 364.), both parts must be

(*) *Mic. 23 & 24 Eliz.* in curia Wardorū inter Randall and Browne.

or either to the first mortgagee or his assignee. *Vid. 2 Eliz. Dier 181. Pl. Com. Chapman's case, 186. 288. Vid. Goodale's case, lib. 5. fol. 98, 97. 17 Ass. pl. 2. Goodale's case, ubi supra. (Mo. 243. Ante, 208 a.) (58)**

209 b. 5. What shall be a sufficient performance. Condition must be performed bona fide. *18 E. 4. fol. 18. lib. 5. fol. 98. Goodale's case, 19 H. 6. 54. 20 E. 3. Account, Pl. 70. (5 Rep. 117.) (5 Rep. 96.)*

225 a. When consisting of

(84) "*Hob. 9. Pease and Styleman.*—A man was bound to pay 20*l.* to such a person as he (the obligee) should by his will appoint. The obligee made J. S. his executor, but made no other appointment. It was resolved, upon demurrer, that the executor should not have the 20*l.* for he is only an assignee in law, who takes to the use of the testator: but here the condition is in favour of an actual assignee, who takes to his own use. The connusee of a fine leases to the consor for 99 years, with condition, if the lessee pays to the lessor, his heirs and assigns, that the uses limited to the connusee and his heirs, by an indenture, should cease: the lessor dies. Lord Nottingham was of opinion, that the uses should not cease by payment to the administrator of the lessor, because he may be an assignee in deed, as here. 11 May, 1659, Sir Andrew Young." —Lord Nott. MSS.

[So it has been held, that if A. be bound to pay ten pounds to the assignee of B. the obligee, B.'s executor shall not have the ten pounds: *socius* if A. be bound to pay ten pounds to B. or his assignee, for then the executor of B. shall be entitled, because it

was a right vested in the obligee himself. 11 Vin. Abr. 161. Godb. 192. But where, on a fine, the use of land was limited to A. for eighty years, with a power to A. and his assigns to make leases for three lives, to commence after the expiration of the term; A. assigned over to B.; B. died, having made his will, and appointed C. his executor; C. assigned over to D.; and D., in pursuance of the power, made a lease for life; the question was, whether D. was such an assignee of A. as to have a power to make this lease, or whether it should extend only to the immediate assignees of A.; a point the more doubtful as there had been a descent on an executor. On its being objected, that an executor should not in some cases be said to be a special assignee, the court seemed inclined to the contrary; and that D. should be considered as an assignee for the purpose of making the leases in question, as well as any person that should come to the estate under the first lessee, though there should be twenty mesne assignments; and on a subsequent day judgment was given accordingly. *How v. Whitebank*, 1 Freem. 476. 11 Vin. Abr. 158.]—[*Ed.*]

divers pars in the conjunctive, both to be performed.

(Sid. 437.

8 Rep. 55 b.)

(c) Bracton,

lib. 2. fol. 18.

Vid. Pl. Com.

76. in Wim-

beshe's case,

and fol. 107.

in Fulmer-

stone's case.

Bracton ubi

supra. (4 Rep.

52 b.) So it

was adjudged

in Communi

Banco Pasch.

30 Eliz. inter

Baldwyn and

Cooke, com-

monly called

Trupennie's

case. (5 Rep.

112.)

Secus, if in

the disjunctive.

Condition in the conjunctive and disjunctive, to be taken wholly in the disjunctive.

(d) Hil. 35 El.

en trespassse

par le Seig-

nior Mor-

dant vers.

George Vaux,

so adjudged

in the King's

Bench.

219 b.

Condition to

create an es-

tate, if per-

formed as

near to the

intent as pos-

sible, suffi-

cient.

(1 Rol. Abr.

426. Plow. 7 a.

performed according to the old rule, (c) *Si plures condiciones ascriptæ fuerunt donationi conjunctim, omnibus est parendum et ad veritatem copulativè requiritur quod utraque pars sit vera* (M 1). But otherwise it is when the condition is in the disjunctive (N 1.), for the same author in that case saith, *Si divisim cuilibet, vel alteri eorum, satis est obtemperare. Et in disjunctivis sufficit alteram partem esse veram.* What then if the condition or limitation be both in the conjunctive and disjunctive: as if a man make a lease to the husband and wife, for the term of one and twenty years, if the husband and wife or any child between them so long shall live, and then the wife dieth without issue; shall the lease determine, or continue during the life of the husband? And the answer is, that it shall continue, for the disjunctive referreth to the whole, and disjoineth not only the latter part, as to the child, but also to the baron and feme, so as the sense is, if the baron, feme, or any child shall so long live.

(d) And so it is if an use be limited to certain persons, until A. shall come from beyond sea, and attain unto his full age, or die; if he doth come from beyond sea, or attain to his full age, the use doth cease.

A diversity is to be understood between conditions that are to create an estate, and conditions that are to destroy an estate; for, by sect. 352, it appeareth, that a condition that is to create an estate, is to be performed, by construction of law, as near the condition as may be, and according to the intent and meaning of the condition, albeit the letter and words of the condition cannot be performed; but otherwise it is of a condition that destroyeth an estate, for that is

(M 1) So where a settlement was made, to the intent, that in case the Duke of Southampton should be married to the settler's daughter, after the age of sixteen, and they should have issue male, then the trustees and their heirs should stand seised of the premises in trust for the duke during his life: the marriage took place before the lady was sixteen, but she lived to that age, and then died without issue; it was adjudged, on appeal to the house of lords, that the duke was not entitled to an estate for life, under the settlement; for the words plainly required that there should not only be a marriage, but also issue male; and where a condition copulative is made precedent to any use or trust, the entire condition must be performed, before the use or trust can arise, *Wood v. Duke of Southampton*, Show. P. C. 83. 2 Freem. 186. Com. Rep. 732. But if a condition be in the copulative, and it is impossible to be so performed, it shall be taken in the disjunctive: As if it be, "that A. and his heirs or executors do such a thing," Rol. Abr. 444; or "that A. and his assigns do it." Ibid. 3 Com. Dig. 112. (K 3).—[Ed.]

(N 1) And, therefore, if the condition be to reinfesoff or pay twenty pounds, and the feoffee do one of them; it is a good performance of the condition. Sheph. Touch. 139. Where the condition consists of two parts in the disjunctive, and the obligor has an election which of them to perform, if one become impossible by default of the party (1 Rol. Abr. 446. 2 Mod. 202, 203.), or by the act of God, he shall not be bound to perform the other part. *Laughter's case*, 5 Co. 22. Poph. 98. Moor, 357. Cro. Eliz. 398. But, in a subsequent case, where the condition was to make the obligee a lease for life by such a day, or pay him 100*l.*, it was adjudged, that, though the obligee died before the day, yet his executor should have the 100*l.*; and the ground of *Laughter's case* was denied to be universal. *Anon.* Salk. 170. *Per Treby, C. J.* Et vid. *Dacosta v. Davis*, 1 Bos. & P. 242. So, if one part was impossible at the time of making, he ought to do the other. 5 Co. 22. Cro. Eliz. 786. 3 Com. Dig. 112. (K 2). Ant. 145 a. vol. 1. p. 452.—[Ed.]

to be taken strictly, unless it be in certain special cases : and of this somewhat hath been said before in this chapter.

Dyer 45 a.)
Secus as to a
condition to
defeat an
estate.

As if a man mortgage his land to W. upon condition, that if the mortgagor and J. S. pay twenty shillings at such a day to the mortgagee, that then he shall re-enter; the mortgagor dieth before the day; J. S. pays the money to the mortgagee; this is a good performance of the condition, and *yet the letter of the condition is not performed (o 1). But if the mortgagor had been alive at the day, and he would not pay the money, but refused to pay the same, and J. S. alone had tendered the money, the mortgagee might have refused it. But if a man make a lease to two for years, with a proviso, if the lessees die during the term, the lessor shall re-enter, one lessee alien his part and die, the other lessee cannot re-enter, but the assignee shall enjoy the term so long as the survivor liveth, and the reason is, because the lease by the proviso is not to cease till both be dead. But in the former case, albeit the mortgagor be dead, yet the act of God shall not disable J. S. to pay the money, for thereby the mortgagee receives no prejudice. And so it is in that case, if J. S. had died before the day, the mortgagor might have paid it.

30 H. 8. tit.
Condit. Br.
190. Vid. 38
H. 8. tit.
Joint. Br. 62.

(60)*

ALSO, if a feoffment be made upon such condition, that the feoffee shall give the land to *the feoffor, and to the wife of the feoffor, to have and to hold to them and to the heirs of their two bodies engendered, and for default of such issue, the remainder to the right heirs of the feoffor. In this case if the husband dieth, living the wife, before any estate in tail made unto them, (85) &c. (here the &c. implieth, according to the condition with the remainder over,) then ought the feoffee by the law to make an estate to the wife as near the condition, and also as near to the intent of the condition as he may make it (p 1), that is to say, to let the land to the wife for term of life, without impeachment of waste (86), the *remainder after his decease to the heirs (87) of the body of her husband on her begotten (q 1), and for default

LITTLETON.
[Sect. 352.
218 b.]
*219 a.

[Coke,
219 a.]

(61)*

(85) &c. not in L. and M. nor Roh.

(86) "Note, if land be given to the wife, and the heirs of the husband of his body begotten, the wife shall have the estate for life, subject to waste.—Sup. 26. b.; therefore

such conveyance is not by force."—Lord Nott. MSS.

(87) *les corps de son baron et de luy engendres*, in L. and M. and Roh.

(o 1) With respect to the effect of the performance of a condition, it may be observed, that it is a rule, that, when a condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed becomes absolute and wholly unconditional. And this as we have before mentioned, was the principle adopted by the judges in the construction of gifts to a man and the heirs of his body, before the statute *De donis*. Ant. vol. 1. p. 508. n. (A 1) 2 Cru. Dig. 41.—[Ed.]

(p 1) Acc. Br. Conditions, pl. 70. Plowd. 291 a. So, where the condition was that the feoffees should reinfest the feoffor and his wife in tail, the remainder to the right heirs of the husband; the wife married a second husband, and the feoffees infeoffed the second husband and the wife for her life, remainder to the right heirs of the first husband; it was adjudged, that the condition was well performed. 5 Vin. Abr. 122. (L. a. 2).—[Ed.]

(q 1) According to the original edition by Lettou and Machlinia, and the Rohan edition, as above mentioned, this passage should be read thus: *the remainder after his decease to the heirs of the body of her husband and herself begotten*. And this reading has been sanctioned

of such issue, the remainder to the right heirs of the husband. And the cause why the lease shall be in this case to the wife alone without impeachment of waste, is, for that the condition is, that the estate shall be made to the husband and to his wife in (88) tail. And if such estate had been made in the life of the husband, then, after the death of the husband, she (89) should have had an estate in tail, which estate is without impeachment of waste. And so it is reason, that as near as a man can make the estate to the intent of the condition, &c. that it should be (90) made, &c. albeit she (91) cannot have an estate in (92) tail, as she (93) might have had if the gift in tail had been made to (94) her husband and (95) to her, in the life (96) of her husband, &c.

(69)* Here is no time limited, therefore the feoffee by the law hath
218 b. time during *his life, unless he be hastened by the request *of the
* 219 a. feoffor or the heirs of his body, as Littleton saith in the next
3 Mar. 134. section.
Dyer 14 Eliz.
Dyer 31. 1 b.

2 H. 4. 5. 44 E. 3. 9. Lib. 2. fol. 79. 80, 81. in Seignior Cromwell's case. (Ante, 208 b. 1 Rol. Abr. 428. 1 Rol. Abr. 614 615 a.) (3 Rep. 59.)

27 E. 3. Dow-
er 135. Seig-
nior Crom-
well's case,
ubi supra.
(6 Rep. 30 b.)
* 219 b.
(1 Rol. Abr.
423.)

And here it appeareth, that, albeit the feme be a stranger, yet the feoffee is not bound to make it within convenient time, because the feoffor, who is privy to the condition, is to take *jointly with her. And so it is if the condition be to infeoff the feoffor and a stranger, the feoffee hath time during his life, unless he be hastened by request. Otherwise it is (as hath been said) where the condition is to infeoff a stranger or strangers only.

(1 Rol. Abr.
428.)

If a man make a feoffment in fee, upon condition, that the feoffee shall make a gift in tail to the feoffor, the remainder to a stranger in

(88) *le* added in L. and M. and Roh.
(89) *ust ewe-ad ewe*, in L. and M. and Roh.
(90) *fait* not in L. and M. nor Roh.
(91) *el-il* in L. and M. and Roh.

(92) *le* added in L. and M. and Roh.
(93) *el-il* in L. and M. and Roh.
(94) *sa-son* in L. and M. and Roh.
(95) *a* not in L. and M. and Roh.
(96) *sa-son* in L. and M. and Roh.

by what fell from Lord C. J. Wilmot, in delivering judgment in the case of *Frogmorton, d. Robinson v. Wharrey*, who observed, "when an estate is limited to a husband and wife, and the heirs of their two bodies, the word 'heirs' is a word of limitation, because an estate is given to both the persons, from whose bodies the heirs are to issue. But when it is given to one only, and the heirs of two (as to the wife and the heirs of her and A. B.) there the word 'heirs' is a word of purchase; for no estate tail can be made to one only, and the heirs of the body of that person and another. This appears from Littleton, sect. 352. according to the true reading collected from the original editions. The common editions make the estate *cy pres*, therein mentioned, to be, to the widow and *les heirs de corps sa baron de luy engendres*; which is not as near as might be to the original estate intended, if the husband had lived; viz. to the husband and wife, and the heirs of their two bodies. But the original edition by Letton and Machlinia, in Littleton's life-time, and the Rohan edition, which is the next (both which my brother Blackstone has), read it thus:—*les heirs de les corps de son baron et luy engendres*; which is quite consonant to the original estate; and this estate, to the widow for life, and the heirs of the body of her husband and herself begotten, Littleton, in the same section, declares not to be an estate-tail. The same is held in Dyer, 99; in *Lane and Pannel*, 1 Rol. Rep. 438, and in *Gossage and Taylor*, Style, 325. which, from a manuscript of Lord Hale, in possession of my brother Bathurst, appears to have been first determined in Hil. 1651; which accounts for some expressions of Lord C. J. Rolle, in *Style's case*, which was in T. Pasch. 1659." 2 Bl. Rep. 728.—[Ed.]

fee, there the feoffee hath time during his life, as is aforesaid, because the feoffor, who is party and privy to the condition, is to take the first estate. But if the condition were to make a gift in tail to a stranger, the remainder to the feoffor in fee, there the feoffee ought to do it in convenient time, for that the stranger is not privy to the condition, and he ought to have the profits presently, as before hath been said.

But in this case, if the feoffee dieth before any feoffment made, then is the condition broken, because he made not the estates, &c. within the time prescribed by the law. But if the feoffment be made upon condition, that the feoffee before the feast of St. Michael the Archangel next following give the land to the feoffor and to his wife in tail, *ut supra*, and before the day the feoffee dieth, the state of the heir of the feoffee shall be absolute, because a certain time is limited by the mutual agreement of the parties, within which time the condition becometh impossible by the act of God, as hath been said before (a 1); and therefore it is necessary, when a day is limited, to add to the condition, that the feoffee or his heirs do perform the condition; but when no time is limited, then the feoffee at his peril must perform the condition during his life (although there be no request made), or else the feoffor or his heirs may re-enter.

* And here is to be observed a diversity when the feoffee dieth, for then (as hath been said) the condition is broken, and when the feoffor dieth, for then the estate is to be made as near the intent of the condition as may be.

"To the wife for term of life, without impeachment of waste."
Here it appeareth, that this estate for life ought to be without impeachment of waste, and yet if the wife doth accept of any estate for life without this clause, without impeachment of waste, it is good, because the state for life is the substance of the grant, and the privilege to be without impeachment of waste is collateral, and only for the benefit of the wife, and the omission of it only for the benefit of the heir (s 1).

Also, if the wife take husband before request made, and then they make request, and the state *is made to the husband and wife, during the life of the wife, this is a good performance of the condition, albeit the estate be made to the husband and wife, where Littleton saith it is to be made to the wife, but it is all one in substance, seeing that the limitation is during the life of the wife.

And it is to be observed, that, after the decease of the husband, the state is not to be made to the wife and the heirs of her body by her late husband engendered, and so to have an estate of inheritance, as she should have had by survivor, if the estate had been made

(a 1) See 206 a. ante, p. 23 n. (m).—[Ed.]

(s 1) And the omission of the privilege of being without impeachment of waste, shall not give the heir of the feoffor, for whose benefit it was omitted, a re-entry, which would defeat the estate of the wife. Hawk. Abr. 307. 2 Co. 82 a.—[Ed.]

Seignior Cromwell's case, ubi supra. (2 Rep. 79. Ante, 208 b.)

219 a. (Sect. 337.)

15 H. 7. 13.
33 H. 6. 28, 27.
9 Eliz. Dier
282. Pl. Com.
466. Lib. 2.
fol. 79. Seignior Cromwell's case. (Sect. 334.)

(1 Rol. Abr. 449. Ante, 206 a.)

(2 Rep. 79 a. 6 Rep. 30 b.)

(63)*
219 b.

Lib. 2. fol. 79.
80, 81. Seignior Cromwell's case. 2 H. 4. 5.

2 H. 4. 5.
Seignior Cromwell's case, ubi supra.

(1 Sid. 288.
328, 304. 442.
Ante, 207 a.
Cro. Eliz. 43.
1 Rol. Abr. 426.)
*220 a.

(4 Rep. 63 a.)

according to the condition, but only an estate for life without impeachment of waste, &c. for that by the authority of Littleton is not so near the intent of the condition as the case that Littleton putteth. But I will search no further into this case, but leave it to the learned and judicious reader.

(Ante, 20 b.
26 b. 27 a.)

Note here, admit that there were two issues in tail, the remainder shall presently vest only in the eldest, and yet if he dieth without issue, it shall *per formam doni* vest in the youngest, as hath been said in the Chapter of Estates *Tail (τ 1): and so it is *tacite* proved here, for otherwise the condition (if there were two issues) could not be performed.

LITTLETON.
[Sect. 353.
290 a.]

ALSO, in this case, if the husband and wife have issue, and die before the gift in tail made to them, &c. then the feoffee ought to make an estate to the issue, and to the heirs of the body of his father and his mother begotten, and for default of such issue, &c. the remainder to the right heirs of the husband, &c. And the same law is in other like cases: and if such a feoffee will not make such estate, &c. when he is reasonably required by them which ought to have the state, by force of the condition, &c. then may the feoffor or his heirs enter (97).

220 a.
(2 Rep. 78 b.
79.)
(Post, 222 b.
214 b. Ante,
208 b.)

Note, here it appeareth, that the feoffee hath time during his life to make the estate, unless he be reasonably required by them that are to take the estate. This is to be intended of parties or privies, and not of mere strangers, for there (as hath been said) the state must be made in convenient time.

(3 Rep. 89 b.)

And concerning the request, it is to be known, that when the request is made, the party or privy must request the feoffee at a time certain to be upon the land, and to make the state according to the condition, for seeing no time certain is prescribed for the making of the state, and it is uncertain when the request shall be made, such request and notice must be made, as hath been said before in this chapter. And of this section, with the &c. there needeth not, upon that which hath been said, any further explication.

219 b.
(Ante, 21 b.)

A. infeoff B. upon condition that B. shall make an estate in frank-marriage to C. with one such as is the daughter of the feoffor; in this case he cannot make an estate in frank-marriage, because the estate must move from the feoffee, and the daughter is not of his blood, but yet he must make an estate to them for their lives, for this is as near the condition as he can. And so it is if the condition be, to make to A. (which is a mere layman) an estate in frankalmoign, yet must he *make an estate to him for his life, for the reason here yielded by Littleton.

(97) &c. added in L. and M. and Roh.

(τ 1) See 26 b. ante, vol. 1. p. 545. and the note there; and Dougl. 488 n.—[Ed.]

ALSO, if a feoffment be made upon condition, that if the feoffee (98) shall re-infeoff many men, to have and to hold to them and to their heirs for ever, and all they which ought to have estate die before any estate made to them, then ought the feoffee to make estate to the heir of him which survives of them, to have and to hold to him and to the heirs of him which surviveth (99) (100).

LITTLETON.
[Sect. 354.
220 b.]

By the re-feoffment it is implied to be made to the feoffors, for a feoffment over to strangers cannot be said a re-feoffment, and if the feoffment should be made over to strangers only, then, as hath been often said, it must be made in convenient time.

220 b.
(2 Rep. 70.)

“To the heir of him which survives, to have and to hold to him and to the heirs of him which surviveth.” Hereupon questions have been made, wherefore the *habendum* is not to the heirs of the heir, and for what reason it is by Littleton limited to the heirs of the survivor. And the cause is, for that if it were made to the heirs of the heir, then some persons by possibility should be inheritable to the land, which should not have inherited if the estate had been made to the survivor and his heirs, and consequently the condition broken.

For example, if the survivor took to wife Alice Fairfield, in this case, if the limitation were to the son and his heirs, then if the son should die without heirs of his father, the blood of the Fairfields (being the blood of his mother) *should inherit. But if the limitation be to the right heirs of the father, then should not the blood of the Fairfields by any possibility inherit, for then it is much as if the state had been made to the survivor and his heirs: and therefore these words (and to the heirs of him which surviveth), which many have thought superfluous, are very material. Note well this kind of fee-simple, for it is worthy the observation: but sufficient hath been said to open the meaning of Littleton, and therefore I will dive no deeper into this point, but leave it to the further consideration of the learned reader (v 1).

(Post. 12 a.)

(66)*

Vid. sect. 4.

ALSO, in the case of feoffment in mortgage, if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such other thing, in full satisfaction of the money, and

LITTLETON.
[Sect. 344.
212 b.]
On condition

(98) *re-infeoffera—infeoffera*, L. and M. and Roh.

(99) *Ec.* added in L. and M. and Roh.

(100) “See whether there is a difference between an obligation and feoffment with condition to re-infeoff.—Obligation on condition to give to the baron and feme and the heirs of the body of the feme before a certain day; and before the day the feme dies. The court was divided whether he ought to make it *cy pres*, in 8 Jac. B. R. Rot. 303. *Roger and Scudamore*. T. 37.—P. 4 E. 6. Bendl.

n. 56. Obligation on condition to infeoff B. and C. and their heirs before such a day, and before the day B. dies, the obligation is discharged. *Sir Ant. Brown’s case*. But this case was denied by the whole court. T. 40 El. C. B. C. C. n. 16. Obligation with condition that the obligor or his heirs should infeoff the obligee and his heirs before a certain day;—before the day the obligee dies: it was ruled that he should infeoff the heir. T. 40 El. C. B. *Hone v. May*, C. C. n. 16.”—Lord Hale’s MSS.

(v 1) See post, Chap. 29. Of Title by Descent.—[Ed.]

for payment
of money, ac-
ceptance of a
collateral
thing suffi-
cient.

the other receiveth it, this is good enough, and as strong as if he had received the sum of money, though the horse or the other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in full satisfaction (101).

213 a. *Nota*, in satisfaction and in full satisfaction is all one.

212 b. Hereupon are many diversities worthy of observation.
(Dyer 1.)

But note a con-
verso;

3 H. 7. 4b.
9 H. 7. 16.
11 H. 7. 23. 21.
19 E. 4. 1b.
47 E. 3. 24.
22 E. 4. 24.
37 H. 6. 38.
Lib. 9. fol. 78.
Peytoe's
case. (1 Rol.
Rep. 296.) 12
H. 4. 23.

(*) Peytoe's
case, ubi su-
pra. (Post,
307.)

First, there is a diversity, when the condition is for payment of money; and when for the delivery of a horse, a robe, a ring, or the like: for where it is for payment of money, there if the feoffee or obligee accept a horse, &c. in satisfaction, this is good: but if the condition were for the delivery of a horse, or robe, there, albeit the obligee or feoffee accept money or any other thing for the horse, &c. it is no performance of the condition. The like law is, if the condition be to acknowledge a recognizance of twenty pounds, &c. if the obligee or feoffee accept twenty pounds in satisfaction of the condition, it is not sufficient in law, (*) but, notwithstanding such acceptance, the condition is broken. And so it is of all other collateral conditions, though the obligee or feoffee himself accept it (w 1).

(67)*
or where the
condition is
to be per-
formed to a
stranger,
4 H. 7. 4. Dyer.
36 H. 3. 56.
27 H. 8. 1.
(Ante, 308b.)

*Secondly, in case when the condition is for payment of money, there is a diversity when the money is to be paid to the party, and when to a stranger; for when it is to be paid to a stranger, there, if the stranger accept a horse or any collateral thing in satisfaction of the money, it is no performance of the condition, because the condition in that case is strictly to be performed. But if the condition be, that a stranger shall pay to the obligee or feoffee a sum of money, there the obligee or feoffee may receive a horse, &c. in satisfaction.

Acceptance
of a less sum
at the day, no
performance.
Lib. 6. fol. 117.
Finnel's
case.
Seems as to
an acquit-
tance by
deed;
26 H. 6. th.
Barre 37.
(Sld. 44. Post.
373 a. Mo. 47.)
or where it is
paid and ac-
cepted before
the day.

Thirdly, where the condition is for payment of twenty pounds, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater. But if the obligee or feoffee do at the day receive part, and thereof make an acquittance under his seal in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole. If the obligor or lessor pay a lesser sum either before the day, or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction.

Fourthly, not only things in possession may be given in satisfac-
tion, (whereof Littleton putteth his case), but also if the obligee or

(101) &c. added in L. and M. and Roh.

(w 1) The reason assigned, [Rol. Rep. 296.] why a collateral thing cannot be satisfied with money, or other collateral thing, is, because the collateral thing is not due, and so no contract can be made of it till the day of payment; and the reason, why money may be satisfied by other collateral thing, is, because it is of a certain value. 5 Vin. Abr. 255.
—[Ed.]

feoffee accept a statute or a bond in satisfaction of the money, it is a good satisfaction.

If the obligor or feoffor be bound by condition to pay an hundred marks at a certain day, and at the day the *parties do account together, and for that the feoffee or obligee did owe twenty pound to the obligor or feoffor, that sum is allowed, and the residue of the hundred marks paid, this is a good satisfaction, and yet the twenty pound was a chose in action, and no payment was made thereof, but by way of retainer or discharge (x 1).

11 R. 2. tit.
Barre 3. 43.
(1 Rol. Abr.
470. 604.)
(Noy. 110.
5 Rep. 117.)
37 H. 6. 26.
46 E. 3. 23.
34 H. 6. 17.
13 H. 8. 1b.
*213 a.

*Note, albeit a convenient time before sun-set be the last time given to the feoffor to tender, yet if he tender it to the person of the mortgagee at any time of the day of payment, and he refuseth it, the condition is saved for that time.

(68)*
906 b.
Tender and
refusal, a suf-
ficient
discharge.
Vid. sect. 325.
(6 Rep. 114.)
909 a.

"If the executors of the feoffor tender the money to the feoffee, &c. if the feoffee refuse it, the heirs of the feoffor may enter, &c."

Nota, a tender by the executors or administrators, and a refusal, doth give the heir of the feoffor a title of entry. And here by this &c. is a diversity implied, when a tender and refusal shall give a third person title of entry.

If a man be bound to A. in an obligation with condition to infeoff B. (who is a mere stranger) before a day, the obligor doth offer to infeoff B. and he refuseth, the obligation is forfeit, for the obligor hath taken upon him to infeoff him, and his refusal cannot satisfy the condition, because no feoffment is made; but if the feoffment had been by the condition to be made to the obligee, or to any other for his benefit or behoof, a tender and refusal shall save the bond, because he himself upon the matter is the cause wherefore the condition could not be performed, and therefore shall not give himself cause of action. But if A. be bound to B., with condition that C. shall infeoff D., in this case if C. tender, and D. refuse, the obligation is saved, for the obligor himself undertaketh to do no act, but that a stranger shall infeoff a stranger. And it is holden in books (e) that in this case it shall be intended, that the feoffment should be made for the benefit of the obligee. Some to reconcile the books seem to make a difference between an express refusal of the stranger, and a readiness of the obligor at the day and place to make performance, and the absence of the stranger: but that can make no difference. I take it rather to be the error of the reporter, and the records themselves are necessary to be seen; for the law herein is, as it hath been before declared.

Secus where
the condition
is to be per-
formed to a
stranger, &c.
33 H. 6. 17.
36 H. 6. 8.
2 E. 4. 2. 3.
15 E. 4. 5. 6.
23 E. 4. 13.
32 E. 3. Barre
264. 7 E. 3.
29. 9 H. 7. 17.
10 H. 7. 14 b.
35 H. 8. Dier.
56. lib. 6.
fol. 22.
Lambe's
case. (6 Rep.
23. 1 Rol.
Abr. 462.
Post. 311 a.
Ante 206 a.)
(e) 8 E. 4. 14.
2 E. 4. ubi su-
pra.

If I. infeoff one in fee upon condition to infeoff I. S. and his heirs, the feoffee tenders the feoffment to I. S. and he *refuseth it, the

19 H. 6. 34.
(69)*

(x 1) So where A. gave B. a bond to secure an annuity, and before any payment became due A. lent B. a sum of money; on which it was agreed, that B. should retain the payments of the annuity as they became due, till that sum was discharged; and then B. became a bankrupt: the agreement to retain was held a good plea to an action on the bond by B.'s assignees for the payments accruing after the bankruptcy, being equivalent to a plea of *soluti ad diem*. *Sturdy v. Arnaud*, 3 T. R. 599.—[Ed.]

(2 Rep. 59.
1 Rol. Abr.
462. 1 Rep.
133b.)

feoffor may re-enter, for, by the express intent of the condition, the feoffee should not have and retain any benefit or estate in the land, but is, as it were, an instrument to convey over the land.

2 E. 4. Entry
conge 25.

But in that case, if the condition were to make a gift in tail to I. S. and he refuseth it, and a tender and refusal is made, there the feoffor shall not re-enter, for that it was intended that the feoffee should have an estate in the land. And so it is if a feoffment be made upon condition, that the feoffee shall grant a rent-charge to a stranger, if the feoffee tender the grant and he refuseth, the feoffor shall not re-enter, because the feoffee was to retain the land; which points are worthy of due observation.

Here, in the case of Littleton, when the executors make the tender, and the feoffee refuseth, albeit the heir be a third person, yet is he no stranger, but he and the executors also are privies in law.

211 a.
What money
may be ten-
dered, and
how.
(2 E. 4. 3. & 4.)

Tender, is a word common both to the English and French, in Latin *offerre*; and in that sense, and with that Latin word, it is always used in the common law. Vide Sect. 514, the tender of the half mark. And before, Sect. 333, 334, 337.

207 a.
Lib. 5. f. 114,
115. Wade's
case, lib. 5.
fol. 78.
(3 Rep. 114.
Wade's case,
2 Inst. 579.
742. 3 Inst.
93.)

"*Money, moneta, legalis moneta Angliæ*," lawful money of England, either in gold or silver, is of two sorts, viz. the English money coined by the king's *authority, or foreign coin by proclamation made current within the realm. *Coyne, cuna dicitur à cudendo*, of coining of money. In French *coine* signifieth a corner, because in ancient times money was square with corners, as it is in some countries at this day. Some say that *coine dicitur à nasce, id est communis, quodd sit omnibus rebus communis*. *Moneta dicitur à momendo*, not only because he, that hath it, is to be warned providently to use it, but also because, *nota illa de authore et valore admonet*. *Pecunia dicitur à pecu*, beasts; *omnes enim veterum divitiæ in animalibus consistebant*; and it appeareth, that in Homer's time there was no money, but exchange of cattle, &c. (y 1).

Aristotle,
li. 5. ca. 8.
(Cro. Car. 89.
Trove and
Conversion
lies for
money out of
a bag.)

(y 1) The coining of money is in all states the act of the sovereign power, that its value may be known on inspection. And with regard to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination. With respect to the materials, Lord Coke, in another work (2 Inst. 577.), lays it down, that the money of England must either be of gold or silver: and none other was ever issued by the royal authority till the year 1672, when copper farthings and halfpence were coined by Charles the Second, and ordered by proclamation to be current in all payments, under the value of sixpence, and not otherwise. As to the impression, the stamping thereof is also the prerogative of the crown; for though divers bishops and monasteries had formerly the privilege of coining money, yet this was usually done by special grant from the king, or by prescription, which supposes one. 1 Hal. P. C. 191. The denomination, or the value for which the coin is to pass current, is likewise in the breast of the king; and if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard, and called esterling or sterling metal; a name for which there are various reasons given, but none of them entirely satisfactory. See Spelm. Gloss. 203. Dufresne, 3. 165. The most plausible opinion seems to be that adopted by these two etymologists.

* *Nummus, ex re regis, quia lege fit, non natura.* Vide (*) (70)*
the statute of 9 H. 5, of the noble, half noble, and farthing of gold, (*) 2 H. 5.
which is the fourth part of a noble, and that is twenty pence. stat. 2. cap. 7.
(Cro. Ells.
841.)

*And it is to be observed also, that the feoffee may tender any 207 b.
money that is current within the realm, albeit it be foreign coin, so (71)*
as it be current by act of parliament, or by the king's proclamation
(z 1), as hath been said (102).

The feoffee may tender the money in purses or bags, without show- 208 a.
ing or telling the same, for he doth that which he ought, viz. to bring
the money in purses or bags, which is the usual manner to carry
money in, and then it is the part of the party that is to receive it, to
put it out and tell it (A 2).

(102) And if, at the time of the feoffment, a base alloy is established by proclamation,
a purer or more weighty money were cur- a tender of the sum in that coin is good.
rent, and before the day of payment coin of Dav. Rep. 18.—[Note to the 11th edition.]

that the name was derived from the *Esterlings*, or *Easterlings*, as those Saxons were
anciently called, who inhabited the district of Germany, now occupied by the Hane towns
and their appendages: the earliest traders in modern Europe. Of this sterling metal all
the coin of the kingdom must be made, by stat. 25 E. 3. c. 13. This standard has been
frequently varied in former times, but has for many years past been thus settled:—The
pound troy of gold, consisting of twenty-two carats (or 24th parts) fine, and two of alloy,
is divided into forty-four guineas and a half of the present value of 21s. each. See *Folkes*
on Coins. And according to the late act (56 Geo. 3. c. 68.), regulating the new silver
coinage, the pound troy of silver, consisting of eleven ounces and two pennyweights fine,
and eighteen pennyweights alloy, is divided into sixty-six shillings. The guinea took its
denomination from the gold, whereof the first was struck, being brought from that part of
Africa called *Guinea*: for which reason it likewise bore the impression of an elephant.
This coin was first struck at the value of twenty shillings; by the scarcity of gold it was
afterwards advanced to twenty-one shillings and sixpence: and anno 3 Geo. 1. it was valued
at twenty-one shillings, at which rate it now passes.

By a proclamation dated the 1st July, 1817, it was ordered, that the new gold coin
called *sovereigns* shall pass current at the value of twenty shillings; each sovereign con-
taining 5 pennyweights, 3 grains, and $\frac{3740}{100000}$ parts of a grain of standard gold.

Another proclamation of the same date directs, that no pieces of gold coin, more deficient
in weight than the rates specified in the table following, shall pass current, viz.

Guineas,	5 pennyweights,	8 grains,
Half do.	2 do.	16 do.
Quarter do.	1 do.	8 do.

And that the seven-shilling gold pieces, and the gold pieces, called *sovereigns*, or twenty-
shilling pieces, more deficient in weight than the rates hereafter specified, viz.

Seven-Shilling Pieces,	1 pennyweight, 18 grains,
Sovereigns, or 20s. Pieces,	5 do. 2½ do.

shall not pass as current and lawful money.

A subsequent proclamation, dated the 10th October, 1817, orders that the new coinage
of half sovereigns, or ten-shilling pieces, shall pass as current and lawful money, if not
weighing less than 2 pennyweights, 13½ grains, and $\frac{370}{100000}$ th parts of a grain.

Gold coin is declared by the above-mentioned statute to be the only legal tender without
any limitation of amount; and no tender of silver coin is legal beyond forty shillings.
—[Ed.]

(z 1) There is at this time no such legitimated money, Portugal coin being only current
by private consent, so that any one who pleases may refuse to take it in payment.—[Ed.]

(A 2) It also behoves the mortgagee to inspect the goodness of the money; for if there
is any bad money in the bags, and the mortgagee accepts it, the mortgagor is not bound to
change it. 5 Co. 115. Vin. Abr. Tender (E). On the other side, the mortgagor, if the
condition be (as it usually is) to pay lawful money of Great Britain, must procure the

LITTLETON.
[Sect. 335.
207 a.]
On tender
and refusal
the feoffee is
without re-
medy.
[COKE,
207 a.]
[COKE,
207 a.]

AND be it remembered that in such case, where such tender of the money is made, &c. (here it is implied at the due time and place according to the condition) and the feoffee refuse to receive it, by which the feoffor or his heirs enter, &c. (viz. into the lands or tene-ments) then the feoffee hath no remedy by the common law to have this money, because it shall be accounted his own folly that he refused the money, when a lawful tender of it was made unto him (B 2).

207 a.
8 E. 2. ut.
Ass. 369.
31 Ass. 32.

And the reason is, because the money is collateral to the land, and the feoffee hath no remedy therefore.

Secus in the
case of bonds;
(2 Rol. Abr.
523, 524, Shd.
13, 354, 355.)
22 H. 6. 39.
21 E. 4. 25.
22 E. 3. 5.
1 H. 8. fol. 79.
H. Peyton's
case. (2 Rol.
Abr. 523.
Dyer 24 b.
26 a. cont.)

If an obligation of an hundred pound be made with the condition for the payment of fifty pound at a day, and at the day the obligor tender the money, and the obligee refuseth the same, yet, in action of debt upon the obligation, if the defendant plead the tender and refusal, he must also plead that he is yet ready to pay the money, and tender the same in court. But if the plaintiff will not then receive it, but take issue upon the tender, and the same be found against him, he hath lost the money for ever.

8 E. 2.
ut. Ass. 369.

If a man be bound in 200 quarters of wheat for delivery of a 100 quarters, if the obligor tender at the day a 100 quarters, &c. he shall not plead *uncore prist*, because albeit it be parcel of the condition, yet they be *bona peritura*, and it is a charge for the obligor to keep them. And the reason wherefore in the case of the obliga-

whole sum in cash, however inconvenient it may be; for bank notes if objected to are not a legal tender. *Grigby v. Oakes*, 2 Bos. & P. 526. But where such notes have been offered in payment, and no objection has been made on that account, it has been considered to be a good tender. *Wright v. Reed*, 3 T. R. 554. And it seems that a court of equity would consider a tender of mortgage money in bank notes, during a restriction as to the issue of money in specie, a sufficient tender. See *Biddulph v. St. John*, 2 Sch. & Lef. 534.

With regard to what shall be a good tender, it is not necessary to prove the actual production of the money in monies numbered; it will be sufficient to show that the person making the tender was in a present condition to substantiate his offer, and that the other party dispensed with the production of the money: but there must be either an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor. *Thomas v. Evans*, 10 East, 101. Et vid. *Read v. Goldring*, 2 Maul. & S. 86. So if a debtor tenders a larger sum than is due and asks change, this will be a good tender if the creditor does not object to it on that account, but only demands a larger sum. *Peake*, N. P. C. 88. Et vid. *Wade's case*, 5 Co. 115 a. But it has been held, that it is not a good tender of a fractional sum, for the debtor to offer the creditor a *bank-note* to a larger amount, and to desire him to take out of that the sum to be paid. *Betterbee v. Davis*, 3 Camp. 70. *Robinson v. Cook*, 6 Taunt. 336. An offer to pay a sum of money with a condition that it shall be accepted as the whole balance due, when a larger sum is claimed, does not amount to a legal tender of the sum offered to be paid. *Evans v. Jenkins*, 4 Camp. 156. But a tender of money to an agent, authorized to receive payment, is a good tender to the creditor himself. *Goodland v. Blawitt*, 1 Camp. 477. Et vid. *Moffatt v. Parsons*, 5 Taunt. 307. 1 Marsh. 55.—[Ed.]

(B 2) It appears here that a condition may be excused by the default of the person to whom it is to be performed, viz. by tender and refusal. It is also excused, 1st. By his absence, in those cases where his presence is necessary for the performance of the condition; 2dly, by his obstructing or preventing the performance; 3d, by his neglecting to do the first act, if it is incumbent on him to perform it (*Walton v. Hill*, Hut. 48. *Duke of St. Albans v. Shore*, 1 H. Bl. 270. *Heard v. Wadham*, 2 East, 619. 2 Cru. Dig. 49. 1 Rol. Abr. 457. 458.); and 4th, by his not giving notice in those cases where notice is necessary. See 3 Com. Dig. 117. Condition (u. 6). See 1 Rol. Abr. 463, 467, 468.—[Ed.]

tion the sum mentioned in the condition is not lost by the tender and refusal, is not only for that it is a duty and parcel of the obligation, and therefore is not lost by the tender and refusal, but also for that the obligee hath remedy by law for the same. And in this case, *liberata pecunia non liberat offerentem*.

But if a man make a single bond, or knowledge a statute or recognizance, and afterwards made a defeasance for the payment of a lesser sum at a day, if the obligor or conusor tender the lesser sum at the day, and the obligee or conusee refuseth it, he shall never have any remedy by law to recover it, because it is no parcel of the sum contained in the *obligation, statute, or recognizance, being contained in the defeasance made at the time or after the obligation, statute, or recognizance. And in this case in pleading of the tender and refusal the party shall not be driven to plead, that he is yet ready to pay the same or to tender it in court: neither hath the obligee or conusee any remedy by law to recover the sum contained in the defeasance. (f) And so it is if a man make an obligation of 100 pound with condition for the delivery of corn, or timber, &c. or for the performance of an arbitrement or the doing of any act, &c. This is collateral to the obligation, that is to say, is not parcel of it, and therefore a tender and refusal is a perpetual bar (c 2) (1).

(2 Saund. 48.)
7 H. 4. 18.
5 Mar. Dar.
150. 21 E. 4.
25. 22 E. 3. 6.
33 H. 6. 9 b.
17 Ass. pl. 2.
20 E. 4. 1 b.
9 H. 6. 16.
36 H. 6. 26.
15 E. 4. 1.
16 H. 7. 13.
18 E. 13. 53.
7 E. 4. 4. 5.
19 H. 8. 12.
27 H. 8. 1 a.
22 H. 6. 39.
ut. Abatement 11.
49 E. 3. 3.
19 H. 6. 12.
(73)*
(f) Henry
Peytoe's
case, ubi su-
pra. 31 Ass.
25. 11 H. 4.
33. 1 H. 6. 8.
1 E. 4. 17 E. 8.

4. 3. Pl. Com. Fogasse's case, fol. 6. (Moore 36, 37. Post. 236 b.

But if a man be bound to make a feoffment in fee to the obligee, and he make a lease and a release to him and his heirs, albeit this be a collateral condition, yet it is well performed, because this amounts in law to a feoffment (v 2) (2).

(c 2) Acc. 2 Rol. Abr. 523. Cro. Eliz. 755. 1 Show. 129.—[Ed.]

[(1) In the 10th, 11th, and 12th editions, there is, in the margin, a reference to 3 Cro. 755; but there is no such page in that volume of Croke. Most probably it is misprinted for 1 Cro. 755. Cotton v. Clifton, where it was held, "that where an obligation is made, and afterwards a defeasance is made thereof, if he pays a lesser sum, there if he pleads the defeasance and the tender of the lesser sum he need not say *tout temps pris*; for by the tender he was discharged of all; but otherwise it is of an obligation, with a condition to pay a lesser sum. Butler. Note, 101.]

(v 2) Acc. Plowd. 7 a. Bro. Abr. Condition, pl. 158. Et vid. Plowd. 156 a. 1 Finch, 48. 9 Finch, 68. But though a lease and release is a good performance of a condition to make a feoffment, yet in many instances the latter mode of conveyance is preferable to the former. To make a feoffment good and valid, nothing is wanting but *possession*; and where the feoffor has possession, though it be ever so bare and naked, yet a freehold or fee-simple passes by it, by reason of the livery, 1 Burr. 92; but it is otherwise of a lease and release, for this conveyance passes only such estate and interest as the releasor himself had. The several kinds of assurances and the difference in their nature and operation will be explained in Chapter 33, Of Title by Alienation, and the subsequent chapters.—[Ed.]

[(2) No authority is cited for this position. In Plowd. 156, it is laid down, that a lease and release may be pleaded as a feoffment; and in 1 Finch, 48, and 2 Finch, 68, it is said, that a lease and release amounts to a feoffment. But this must be understood with some qualifications, as the operation of a feoffment is in some instances, much more forcible, and of course may be much more beneficial to the person entitled to the benefit of the condition, than the operation of a lease and release. The nature of a feoffment will be considered in one of the notes to the chapter of Releases; with respect to the difference adverted to above, between the operation of a lease and release, and the operation of a feoffment; it is immaterial whether by the lease, is understood a bargain and sale for years under the statute, or a lease at common law, with an actual entry by the lessee. In either case, though the

LITTLETON.
[Sect. 338.
209 a.]

AND note, that in all cases of condition for payment of a certain sum in gross touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit, and fully discharged for ever afterwards.

209 a.
or where the
mortgage was
for a prece-
dent debt.
Vid. sect. ac-
quen.

*209 b.
(9 Rep. 79 a.)

(74)*

* This is to be understood, that he that ought to tender the money is of this discharged for ever to make any other tender; but if it were a duty before, though the feoffor enter by force of the condition, yet the debt or duty remaineth. As if A. borroweth a *hundred pound of B., and after mortgageth land to B. upon condition for payment thereof; if A. tender the money to B. and he refuseth it, A. may enter into the land, and the land is freed for ever of the condition, but yet the debt remaineth, and may be recovered by action of debt. But if A., without any loan, debt, or duty *preceding, infeoff B., of land upon condition for the payment of a hundred pounds to B. in nature of a gratuity or gift; in that case, if he tender the hundred pound to him according to the condition, and he refuseth it, B. hath no remedy therefore; and so is our author in this and his other cases of like nature to be understood (E 2).

lessor had the possession, yet unless he was seised of the freehold, when he executed the lease, his release would not vest an estate of freehold in the releasee. But his feoffment, if he had but a mere possession, would vest the freehold in the feoffee. In the same manner, if tenant for life infeoff in fee, it divests the whole inheritance, and is a forfeiture of his estate. But nothing of this is produced by a release grounded upon a previous lease, either at common law; or by the statute. *Butler*. Note, 102.]

(E 2) Where a tender of payment was made by a mortgagor to the agent of the mortgagee, and the agent refused to accept, alleging he had no authority; and neither principal nor interest was demanded for twenty-four years thereafter; yet payment of principal and interest for the whole time was decreed, and the decree, on appeal to the lords, was affirmed. *Meade v. Earl of Bandon*, 2 Dow. 268.

Before we quit the subject of mortgages, some observations seem necessary with regard to the nature of foreclosure:—After the day of payment is past, but not before, the mortgagee may call on the mortgagor in a court of equity to redeem his estate, or, in default thereof, to be for ever foreclosed, that is, barred from any further right of redemption. *Bonham v. Newcomb*, 1 Vern. 232. 2 Vent. 364. And the mortgagee may file a bill of foreclosure without taking possession, *Lord Penrhyn v. Hughes*, 5 Ves. 106; and, if out of possession, he may bring an ejectment (except under particular circumstances,) at the same time that he has a bill of foreclosure depending, *Booth v. Booth*, 2 Atk. 343. Ante, vol. i. p. 455. n. (q); or, if the personal estate be deficient, and the heir and personal representative of the mortgagor be the same person, he may, in the first instance, pray a sale of the mortgaged premises. *Daniel v. Skipwith*, 2 Bro. C. C. 155. A decree of foreclosure binds an intail of the equity of redemption, *Roscarick v. Barton*, 1 Ch. Ca. 217; and it may be made against a feme covert, 3 P. Wms. 352; and against an infant, 3 P. Wms. 401. But where a bill of foreclosure is brought against an infant, it is usual to decree a foreclosure, with a day to show cause when he becomes adult, 3 P. Wms. 401. *Booth & Dick*, 1 Vern. 295. *Goodier v. Ashton*, 18 Ves. 83; though the court, in case the mortgagees consent to a sale, will direct an inquiry, whether it will be for the infant's benefit, *Mondrey v. Mondrey*, 1 Ves. & B. 83. When a day is given to show cause, the infant when of age is not allowed to ravel into the account, nor is he entitled to redeem the mortgage, by paying what is reported due; but is only entitled to show an error in the decree. *Malluch v. Gaston*, 3 P. Wms. 352. A decree of dismissal of a bill filed by a mortgagor for redemption, for non-payment of the mortgage money at the time (*Stewart v. Warral*, 1 Bro. C. C. 581.), operates as a foreclosure, *Garth v. Ward*, 2 Atk. 174. *Bishop of Winchester v. Payne*, 11 Ves. 199; but the dismissal of a bill for redemption, for want of prosecution, does not prevent the filing of another bill. *Hansard v. Hardy*, 18 Ves. 460. The time for payment limited in the decree of foreclosure, may be enlarged by the court in consequence of particular circumstances, though such decree be signed and inrolled. *Anon.* 2 Ab. Eq. 605. Et vid. *Edwards v. Cunkiffe*, 1 Mad. Rep. 287. And if, after a foreclosure and a sale, the

*Littleton, having spoken of defaults of performance, or express breaches of condition (¶ 2), speaketh now in what cases the feoffee in judgment of law doth disable himself to perform the condition: and of disabilities, some be by act of the party, and some by act in law.

*ALSO, if a feoffment be made upon condition to infeoff another, or (103) to make a gift in (104) tail to another, &c. (here is implied an estate for life or for years, &c.) if the feoffee, before the performance of the condition, infeoff a stranger, or make a lease for life, then *may the feoffor and his heirs enter, &c. because he*

LITTLETON.
[Sect. 355-
220 b.]
Condition
broken by a
*221 a.

(103) *de* not in L. and M. nor Roh.

(104) *le* added in L. and M. and Roh.

mortgagee brings an action for the balance, this in general opens the foreclosure. *Dashwood v. Blythway*, Ab. Eq. 317. But where the mortgagee had taken possession a considerable time, and the balance was inconsiderable, a *perpetual* injunction was decreed. *Perry v. Barker*, 8 Ves. 527. 13 Ves. 198. Et vid. *Wichalse v. Short*, 3 Bro. P. C. 559. *Lani v. Cripe*, 5 Bro. P. C. 200. *Jones v. Kenrick*, 5 Bro. P. C. 244.

It remains to notice the statute of 7 Geo. 2. c. 20. which recites, that in ejectments by mortgagees for the recovery of the mortgage lands, and in actions on bonds given by the mortgagees to pay the money, courts of law have not power to compel mortgagees to accept the principal and interest due to them and costs, or to stay mortgagees from proceeding to judgment in such actions; but mortgagors must have recourse to a court of equity, in which case courts of equity do not relieve till the hearing of the cause. For remedy whereof it is therein enacted, "that, in actions on bonds for payment of mortgage money, or in ejectments in any of the courts at Westminster, at sessions in Wales, or in the counties palatine of Chester, Lancaster, or Durham, for the recovery of mortgaged lands, when there is no suit depending in equity for foreclosing thereof, if the person having right to redeem, and who shall become defendant in any such action, shall at any time pending such action pay such mortgagee, or, in case of his refusal, bring into court all principal and interest due on the mortgage and all costs, the monies paid to such mortgagee, or brought into court, shall be in full discharge of the mortgage; and the court may compel such mortgagee to reconvey the mortgage lands, and deliver up all deeds relating to the title thereof. And that, in all suits in equity for foreclosure, courts of equity, upon application made by the defendant, having a right to redeem, and upon admitting plaintiff's right, may, at any time before the cause be brought to a hearing, make such decree therein, as they could have made in case such cause had been regularly brought to hearing." But to avail himself of the benefit of this act, the mortgagor must apply before the mortgagee is entitled to take out execution. *Amis v. Lloyd*, 3 Ves. & B. 16. On the construction of this statute, see *Goodtitle, d. Taysum v. Pope*, 7 T. R. 185. *Huson v. Hewson*, 4 Ves. 105. *Bustard v. Clarke*, 7 Ves. 589. *Wakerell v. Delight*, 9 Ves. 36. *Hewitt v. McCartney*, 13 Ves. 560. *Doe, d. Tubb v. Roe*, 4 Taunt. 887.

That a court of equity will, under particular circumstances, restrain the mortgagee from proceeding at law, as where a mortgagee lodged the title deeds with his attorney, who claimed a lien upon them for business done, see *Schoole v. Sall*, 1 Sch. & Lef. 176. For though a mortgagee has a right to proceed on his mortgage and bond at the same time, yet the mortgagor shall not be obliged to pay upon his bond, unless he is secure that his title deeds shall be delivered up. So the executor of a mortgagee shall be restrained from enforcing payment, and the money ordered to be paid into court, where there is no heir of the mortgagee who can convey. *Ibid*.

With regard to estates held by statute-merchant, statute staple, and elegit, see the notes to fol. 289 b. post, Book III. chap. 2. Of Execution.—[*Ed.*]

(¶ 2) A. bequeathed an annuity to B. with condition to fall into the residue, upon his signing any instrument agreeing to sell, assign, charge, or dispose of it, or empowering any person to receive it, &c. in the most comprehensive terms; B. took the benefit of an insolvent act: this was held to be a breach of the condition, for the act was voluntary in B. *Shee v. Hale*, 13 Ves. 404.—[*Ed.*]

disability to perform;
[COKE,
220 b.]

(76)*
221 a.
13 H. 7. 23 b.
24 E. 3. Barre
264. 21 Ass.
23. 23 Ass.
pl. 7. (3 Rep.
53. 1 Ed.
Abr. 447.)

hath disabled (a 2) himself to perform the condition, inasmuch as he hath made an estate to another, &c.

*This is a disability by the act of the party, for herein the feoffee hath disabled himself to make the feoffment or other estate according to the condition. And to speak once for all, the feoffee is disabled when he cannot convey the land over according to the condition in the same plight, quality, and freedom as the land was conveyed to him, for so the law requireth the same, as shall manifestly appear hereafter. And here, where our author speaketh of a feoffment, he includeth an estate tail as well as the fee simple.

LITTLETON.
[Sect. 356.
221 a.]
or to perform
in the same
plight;
[COKE,
221 a.]
(4 Rep. 52.)
(5 Rep. 56.)

IN the same manner it is, if the feoffee, before the condition performed, letteth the same land to a stranger for term of years, &c. (here the &c. implieth a lease to take effect in futuro as well as in presenti, also a lease for one year or half a year, &c.); in this case the feoffor and his heir may enter, &c. because the feoffee hath disabled him to make an estate of the tenements according to that which was in the tenements, when the state thereof was made unto him. For if he will make an estate (105) of the tenements according to the condition, &c. then may the lessee for years enter and oust him to whom the estate is made, &c. and occupy this during his term (106).

221 a. The reason of this is evidently set down before. And again, of disabilities some be by act *in presenti*, whereof Littleton hath put two examples, and some *in futuro*, whereof now he will speak in the next section.

LITTLETON.
[Sect. 357.
221 a.]
*221 b.

*AND many have said, that if such feoffment be made to a single man upon the same condition, and before he hath performed *the same condition he taketh wife (107), then the feoffor and his heirs maintainment may enter, because if he hath made an estate, according to the condition, and after dieth, then (108) the wife shall be endowed, and may recover her dower by a writ of dower, &c. and so by the taking of a wife, the tenements be put in another plight than they were at the time of the feoffment upon condition, for that then no such (109) wife was dowable, nor should be endowed by the law, &c.*

221 a. *First, here is an example if a disability both by act in law and (77)* *in futuro*, for by marriage the wife is entitled by law to dower, after the death of her husband.

(g) 13 H. 7.
23 b. 24 E. 3.
*221 b.

Secondly, it (g) appeareth, that albeit the wife by the marriage is but entitled to have *dower, and the estate which she is to have in

(105) *de les tenements* not in L. and M. nor Roh.

(106) &c. added in L. and M. and Roh.

(107) *donques-que* in L. and M. and Roh.

(108) *la-ai* in L. and M. and Roh.

(109) *feme* not in L. and M. nor Roh.

(c 2) See on this subject, Sheph. Touch. chap. 6. p. 142. 3 Com. Dig. 123. (M. 2, 3, 4, 5.) 1 Bac. Abr. 653. 5 Vin. Abr. 221.—[Ed.]

future, viz. after the decease of her husband, yet it is a present cause of entry. As a lease for years to begin at a day to come is a present disability and cause of re-entry, for that the land is not in that freedom and plight as it was conveyed to the feoffee, and after the state made over according to the condition the land shall be charged therewith.

Dower 127.
M. 27 E. 3.
tit. Dower
236. 28 Ass.
pl. 4. 11 H. 7.
7. 6. 1th. 2.
fol. 59 b. (5
Rep. 30 b.
21 a.) Julius
Winning-
ton's case,
11b. 2. fol. 59,
60.
though the
disability be
afterwards
removed.

"Then the feoffor and his heirs maintenance may enter." Here it appeareth, that seeing that for this title or possibility the feoffor may presently enter, that albeit the wife happen to die before the husband, so as this title or possibility took no effect, yet the feoffor may re-enter; for the feoffee being disabled at any time, though the same continue not, yet the feoffor may re-enter, for in that case he that is once disabled is ever disabled.

And herein a diversity is to be observed between a disability for a time on the part of the feoffee, and a disability for a time on the part of the feoffor. For if a man maketh a feoffment in fee, upon condition that the feoffee, before such a day, shall re-infeoff the feoffor; the feoffee taketh wife, and the wife dieth before the day; yet may the feoffor re-enter.

Secus as to a
disability on
the part of
the feoffor;
(5 Rep. 21 a.)

So it is, if the feoffee before the day entereth into religion, and is professed, and before* the day is deraigned; yet the feoffor may re-enter.

21 E. 4. 55.
*293 a.

So it is, if the feoffee before the day make a feoffment in fee, and before the day take back an estate to him and his heirs; yet the feoffor may re-enter.

Albeit in these cases a certain day be limited, yet the feoffee, being once disabled, is ever disabled. And so it is, when no time is limited by the parties, but the time is appointed by the law.

But if a man make a feoffment in fee upon condition, that if the feoffor or his heirs pay a certain sum of money before such a day, the feoffor commit treason, is attainted and executed, now is there a disability on the part of the feoffor, for he hath no heir; but if the heir be restored before the day, he may perform the condition, as it was resolved (). Trin. 18 Eliz. in *Communi Banco*, in *Sir Thomas Wiat's* case, which I heard and observed. Otherwise it is, if such a disability had grown on the part of the feoffee; and the reason of the diversity is, for that, as Littleton saith, *maintenance* by the disability of the feoffee, the condition is broken, and the feoffor may enter, but so it is not by the disability of the feoffor, or his heirs; for, if they perform the condition within the time, it is sufficient, for that they may at any time perform the condition before the day. And so it is, if the feoffor enter into religion, and before the day is deraigned, he may perform the condition for the cause aforesaid. *Et sic de similibus*.

(78)*

(2 Rep. 79 a.)

(*) Trin. 18
Eliz. in *Communi Banco*
in *Sir Thomas Wiat's*
case.

(Flo. 553 a.
554. Cro. Car.
427. Hob. 394.)

"To a single man." For if the feoffee were married at the time of the feoffment, then the dower can be no disability, because

291 b.

the land shall remain in such plight as it was at the time of the feoffment made unto him.

(1 Rol. Abr.
47.)

Plight is an old English word, and here signifieth not only the estate, but the habit and quality of the land, and extendeth to rent-charges, and to a possibility of dower. Vid. Sect. 289, where plight is taken for an estate or interest of and in the land itself, and extendeth not to a rent-charge out of the land.

222 a. The &c. in this section are sufficiently explained.

LITTLETON.
[Sect. 368.
222 a.]

(79)*

*IN the same manner it is, if the feoffee charge the land by his deed with a rent-charge before the performance of the condition, or be bound in a statute staple, or statute merchant, in these cases the feoffor and his heirs may enter, &c. causâ quâ suprâ. For whosoever cometh to the lands by the feoffment of the feoffee, (110) they ought to be liable, and put in execution *by force of the statute merchant, or of the statute staple. (111) Quære. But when the feoffor or his heirs, for the causes aforesaid, shall have entered, as it seems they ought, &c. then all such things, which before such entry might trouble or incumber the land so given upon condition, &c. as to the same land, are altogether defeated.*

222 a.
13 H. 7. 22 b.
44 E. 3. 9 b.
20 E. 3. 73.
20 H. 6. 34.
Julius Wyn-
nington's
case, ubi su-
pra. (1 Rol.
Abr. 447.)
(5 Rep. 20 b.)

And here it is to be understood, that the grant of the rent-charge is a present disability of the feoffee, and therefore albeit the grantee doth bring a writ of annuity, and discharge the land of it, *ab initio*, yet the cause of entry being once given by the act of the feoffee, the feoffor may re-enter. And so it is, if the grant of the rent-charge were made for life, and the grantee died before any day of payment, yet the feoffor may re-enter.

18 Ass. pl.
ult. 19 E. 3.
39.

The like law is, of any judgment given against the feoffee, wherein debt or damages are recovered.

Lit. 2. fol. 80 b.
Seignior
Cromwell's
case. (4 Rep.
119.)

And it is to be observed, that Littleton puts these cases as examples, for there are some other disabilities implied, that are not here expressed.

*222 b.
(Anto. sect.
364. 1 Rol.
Abr. 464.)

The Lord Clifford did hold his barony and the sheriffwick of Westmoreland, of the king by grand serjeanty *in capite*, and the king gave him license that he might infeoff thereof divers chaplains in fee, so that they should give the same to the Lord Clifford and the heirs *male of his body, the remainder over, &c. : the Lord Clifford according to the license infeoffed the chaplains, and before they made the re-conveyance the Lord Clifford died; and it was adjudged that the heir might enter for the condition broken. For in this case the feoffees were bound by law to have made the gift in tail to the Lord Clifford himself, albeit he never made any request, for otherwise they pursued not the license, and if they should make the state to the issue of the Lord Clifford, then might the king seise.

(110) *eux-donques les tenements*, L. and M. and Roh. (111) *Quære-Esc*. L. and M. and Roh.

the barony, &c. for default of a license, and that in default of the feoffees. And then the same should not be in the same plight and freedom as it was *at the time of the feoffment made upon condition, (80)* which is worthy of observation.

If a man grant an advowson, upon condition that the grantee shall re-grant the same to the grantor in tail; in this case, if the church become void before the re-grant, or before any request made by the grantor, he may take advantage of the condition; because the advowson is not in the same plight as it was at the time of the grant upon condition. And so it was resolved, (*) Pasch. 14 Eliz. in Communi Banco, between Andrewes and Blunt, which I heard and observed, and which my Lord Dyer hath omitted out of his report of that case, and therefore the grantee in that case at his peril must re-grant it before the church becomes void, or else he is disabled, otherwise he hath time during his life if he be not hastened by request.

(2 Rep. 79.
1 Leon. 167.)

(*) Pasch.
14 Eliz. 311.
Dier.

If the feoffee suffer a recovery by default upon a feigned title before execution sued the feoffor may re-enter for this disability (H 2). *Et sic de similibus.*

If the feoffee be disseised, and after bind himself in a statute staple, or merchant, or in a recognizance, or take wife, this is no disability in him, for that during the disseisin the land is not charged therewith, neither is the land in the hands of the disseisor liable thereunto. And in that case if the wife die, or the conusee release the statute or recognizance, and after the disseisee doth enter, there is no disability at all, because the land was never charged therewith; and therefore in that case the feoffee may enter and perform the condition in the same plight and freedom as it was conveyed unto him.

292 a.
or where the
act (other-
wise causing
a disability)
is done dur-
ing dissei-
sin.
Lib. 2. fo. 88.
60. Julius
Wynning-
ton's case.
(2 Rep. 79 a.
10 Rep. 40 b.)

ALSO, if a man infeoff another (112) upon condition, that he and his heirs shall render to a stranger and to his heirs a yearly rent of twenty shillings, &c. and if he or his heirs fail of payment thereof, that then it shall be lawful to the *feoffor and his heirs to enter, this is a good condition; and yet in this case, albeit such annual payment be called in the indenture a yearly rent, this is not properly a rent. For if it should be a rent, it must be rent-service, rent-charge, or a rent-seck, and (113) it is not any of these. (This is a good logical argument à divisione, et argumentum à divisione est fortissimum in lege. (h) Littleton says this argument elsewhere, where see more of this matter.) For if the stranger were seised of this, and after it were denied him, he shall never have an assise of this, because that it is (114) not issuing (115) out of any tenements; and so the stranger hath

LITTLETON.
[Sect. 345.
213 a.]
7. Who may
take advant-
age of a con-
dition
broken.
(81)*
Re-entry may
be reserved
to, and be
made by the
feoffor and
his heirs
only;
[Coke,
213 b.]
(A) Vind. sect.
361.

(112) *en fee* added L. and M. and Roh.

(114) *pas* not in L. and M.

(113) *que* added L. and M. and Roh.

(115) *hors* not in L. and M.

(H 2) So if a real recovery be had against the feoffee, and execution thereupon, it will be a breach of the condition. Rol. Abr. 448.—[Ed.]

not any remedy, if such yearly rent be behind in this case, but that the feoffor or his heirs may enter, &c. And yet if the feoffor or his heirs enter for default of payment, then such rent is taken away for ever. And so such a rent (116) is but as a pain set upon the tenant and his heirs, that if they will not pay this according to the form of the indenture, they shall lose their land by the entry of the feoffor or his heirs for default of payment. And in this case it seemeth, that the feoffee and his heirs ought to seek the stranger and his heirs, if they be within England, (117) because there is no place limited where the payment shall be made, and for that such rent is not issuing out (118) of any land, &c.

213 a.
(Dr. & Stud.
cap. 20.)
(i) Lib. 8. fol.
70, 71. (Flo.
243. sera bon
in case le
Roy. Post,
47 a. Cro.
Car. 266.
Ante, 143 b.)

"Rendering to a stranger an annual rent, &c." This reservation is merely void (i) for the reasons in this section alleged by Littleton, and also for that no estate moveth from the stranger, and that he is not party to the deed.

(82)*
(k) 6 E. 2.
Entire cong.
56. recipere.
8 Ass. 34. re-
vertere.
(1 Rep. 76.
Godbolt 443.)

And albeit it be a void reservation, and can be no rent, and the words of the condition be, that if the feoffee or his heirs fail of payment of it, (that is, of the annual rent) that then, &c. yet it appeareth that the condition is good, and annual rent shall be taken for an annual sum of money in gross, and not in the proper signification thereof, viz. to be a rent issuing out of land, which is to be observed, that words in a condition shall be taken out of their proper sense, *ut res *magis valeat quàm pereat*: and so in like cases it is holden (k) in our books.

(Ante, 146 a.
Sect. 221.)

But if A. be seised of certain lands, and A. and B. join in a feoffment in fee, reserving a rent to them both and their heirs, and the feoffee grant that it shall be lawful for them and their heirs to distrain for the rent, this is a good grant of a rent to them both, because he is party to the deed, and the clause of distress is a grant of the rent to A. and B., as it appeareth before in the Chapter of Rents. But if B. had been a stranger to the deed, then B. had taken nothing. And upon this diversity are all the books (l) which *primà facie* seem to vary, reconciled.

(l) 18 E. 2.
Ass. 381. 26
H. 8. 2. 13
E. 2. Feoff-
ments and
Fairs, 108.
31 Ass. pl. 31.

Note here, seeing it is but a sum in gross, there need no demand of the rent; for Littleton here saith, that the feoffee ought to seek the person of the stranger to pay him the sum of money, because it is a sum in gross, and not issuing out of the land.

LITTLETON.
[Sect. 346.
213 b.]

AND here note two things: one is, that no rent (which is properly said a rent) may be reserved upon any feoffment, gift, or lease, but only to the feoffor, or to the donor, or to the lessor, or to their heirs, and in no (119) manner (120) it may be reserved to any strange person.

(116) *n'est-est*, L. and M. and Roh.
(117) *pur ceo que nul liex est limit p ou le
payment terra fait*, et, not in L. and M. nor
Roh.

(118) *hors* not in L. and M. nor Roh.
(119) *outer* added in L. and M. and Roh.
(120) *if* not in L. and M. nor Roh.

"To the feoffor, donor, &c. or to their heirs." Hereby it may seem, that if a man make a feoffment, gift, or lease, that (omitting himself) he may reserve a rent to his heirs (121). But Littleton is not so to be understood; his *meaning is, that either the feoffor, &c. may reserve the rent to himself only, or to himself and his heirs. And yet it is holden (m) in our books, that a man may make a feoffment in fee, reserving a rent of forty shillings to the feoffor for term of his life, and *after his decease, a pound of cumin to his heirs, that this is good.

213 b.
(Hob. 130.
2 Rol. Abr.
447. Post. 388.
8 Rep. 71.
Ante. 39 b.)
(83)*
(m) 5 E. 3. 27.
28. (Ante.
164 a.)
(10 Rep. 106.
Hob. 130.)
*214 a.

If a man make a feoffment in fee, reserving a rent to him or his heirs, it is good (n) to him for term of his life, and void to his heir.

(Post. 47 a.)
(n) Lib. 5.
fol. 111. Mal-
lorie's case.

(121) "Plo. 107. If a man leases, rendering rent to the heir, it is void; for the heir takes as purchaser, and is *quasi* a stranger. Hob. 130. *Oats v. Frith*. Father seised in fee and son join in a lease to commence after the death of the father, rendering rent to the son, and dies, the reservation was adjudged void; for though the son proves heir by the event, that does not mend the case: but if the reservation had been to the heir of the lessor, omitting the lessor, it would have been good; for though the rent never was in the father to demand, yet the son would take it; not as a purchaser, but as a rent inherent in the root of the reversion, which he has by descent from his father; and in this sense the rent itself was in the father, viz. to release (by the word rent, but not action) though not to ask. So note the difference (says Hobart) when in such a lease the rent is reserved to the heir first, omitting the ancestor, which is good, and where an annuity or warranty is granted against the heir, omitting the ancestor, which is not good. It appears in the case of Littleton, that though the reservation to a stranger be bad to carry any rent to the stranger, yet it will be good to the lessor, and that not only during his life, but generally during all the term; for when it is said, rendering to I. S. the words I. S. shall be void, in the same manner as if he had said, rendering rent generally; because, 1st. If a man leases, rendering rent to him and a stranger, it is good to him clearly, and void to the stranger. 31 Ass. 30. 2dly. When a man leases, rendering rent to him and his heirs generally, yet the law will direct it to an issue who is not his heir general, merely for congruity's sake. Dyer, 115 b. *Sr Thomas Wyatt's case*, and before 12 b. Difference between a lease reserving rent to I. S. and a lease upon condition, that I. S. shall re-enter if the rent be in arrear, for there neither shall enter; not I. S. because he cannot by law; not the lessor, because there are no words to give re-entry to any beside I. S. But in the case of Doctor and Student, feoffment upon condition, that he

shall pay 20l. to I. S. and that otherwise I. S. shall re-enter; there, though I. S. cannot re-enter, the feoffor can, for there the condition was created by the first words: and though he intends the advantage of this to I. S. it does not signify. So 28 H. 8. Dyer, 33. Devise to the prior of St. B. so that he pays to the Dean and Chapter of St. Paul's, and that if he does not so, the Dean and Chapter shall have it, that is a void condition to make it a remainder, but it is good for the deviser to re-enter. Difference between a rent upon a lease and a rent upon a feoffment; in the last case rent would be void to a stranger, and yet not good to the feoffor, because the law does not create it, and it is not so reserved; but the case of a feoffment is like to a grant of rent to I. S. and that if it be in arrear that I. D. shall distrain, there the distress is of no value. 40 Ass. 26. But here the words are sufficient to create a rent, and, in an entire clause, part may be void. 4 E. 4. Obligation to I. S. payable to I. D. it is good to I. S. Difference where the repugnancy of words appears, as here, and where it does not: as a release of all actions which I have as executor, and I have none as executor; this is void, because it does not appear. 22 H. 7. Kel. 83 b. *Cestuy que use* leases, rendering rent to himself, and dies; the heir shall have the rent. Yet in 5 H. 7. 5 b. the rent, with the reversion, goes to the feoffees, though reserved to the *cestuy que use*; yet in law the feoffees are donors; so it is, in effect, the feoffees' lease, rendering rent to the *cestuy que use*, it is good for themselves, which is stronger. Sir Geo. makes a feoffment to the use of himself for life; remainder to William Huntley his son and heir apparent and his heirs: Sir Geo. and William join in a lease for years, rendering rent to Sir Geo. his heirs and assigns: Sir Geo. dies. Resolved, that the reservation and the rent are determined; for William is not in as heir, and therefore he cannot have the rent. *Huntley's case*, Palm. 495." Lord Nott. MSS.

LITTLETON.
[Sect. 346.
21.]
(84)*

*BUT if two joint-tenants make a lease by deed indented, reserving to one of them a certain yearly rent, this is good *enough to him to whom the rent is reserved, for that he is privy to the lease, and not a stranger to the lease, &c.*

214 a.
5 E. 4. 4 a.
27 H. 8. 16.
Vid. sect. 53.
(Post. 318 a.
47 a.)

This case being by deed indented, (1) is evident, and it hath been touched before (1 2) ; but if that two joint-tenants, without a deed indented, make a lease for life, reserving a rent to one of them, it shall enure to them both, in respect of the joint reversion. And so it is of a surrender to one of them, it shall enure to them both.

(Ante, 192 a.
6 Rep. 15 a.
Post. 43 a.
46 a. 53 b.
Ante, 193 a.)

If two joint tenants, the one for life, and the other in fee, join in a lease for life, or a gift in tail, reserving a rent, the rent shall enure to them both; for, if the particular estate determine, they shall be joint tenants again in possession. But if tenant for life, and he in the reversion, join in a lease for life, or a gift in tail by deed, reserving a rent, this shall enure to the tenant for life only, during his life, and after to him in the reversion, for every one grants that which he may lawfully grant; and if, at the common law, they had made a feoffment in fee generally, the feoffee should have holden of the tenant for life during his life, and after of him in reversion: and so it was holden (o) in the king's bench.

Vid. sect. 53.

(o) Mich. 36
& 27 Kil.

LITTLETON.
[Sect. 347.
214 a.]
and not by a
stranger:

THE second thing (122) is, that no entry nor re-entry (which is all one) (123), may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heirs; and such (124) re-entry cannot be given to any other person (x 2). For if a man letteth (125) land to another for term of life by indenture, rendering to the lessor and to his heirs a

(122) est not in Roh. but in L. and M.

(125) certine added in L. and M. and

(123) ne added in L. and M. and Roh.

Roh.

(124) re-enter-rent in L. and M. and Roh.

(1) The principle which gave rise to this rule is, that rent is considered as a retribution for the land, and is therefore payable to those who would otherwise have had the land. It is to be observed that remainder-men in a settlement, being, at first view, neither feoffors, donors, lessors, nor the heirs of feoffors, donors, or lessors, there seems to have been, for some time after the statute of uses, a doubt, whether the rent of leases made by virtue of powers contained in settlements, could be reserved to them. In Chudleigh's case. 1 Rep. 139. it is positively said, that if a feoffment in fee be made to the use of one for life, remainder to another in tail, with remainder over, with a power to the tenant for life to make leases, referring the rent to the reversioners, and the tenant for life accordingly make leases, neither his heirs nor any of the remainder-men shall have the rent. But in *Harcourt v. Pole*, 1 Anders. 273. it was adjudged, that the remainder-men might distrain in these cases. And in Sir Thomas Jones, 36. the *dictum* in Chudleigh's case is denied to be law. The determination in *Harcourt v. Pole*, will appear incontrovertibly right, if we consider that both the lessees and remainder-men derive their estate out of the reversion, or original inheritance of the settler; and therefore the law, to use Sir Edward Coke's expression in *Whitlock's case*, 8 Rep. 71. will distribute the rent to every one to whom any limitation of the use is made.—[*Butler*. Note, 116.]

(1 2) Ante, 192 a. vol. 1. p. 734. As to the reservation of rent in case of leases made by virtue of powers in marriage settlements, see 47 a. post. chap. 83. Of Leases.—[*Ed.*]

(x 2) A right of entry always supposes an estate; and if a grant is made to a man reserving rent, and, in default of payment, a right of entry is granted to a stranger, it is void. *Smith v. Packhurst*, 3 Atk. 134.—[*Ed.*]

*certain rent, and for default of payment a re-entry, &c. if afterward the lessor by a deed granteth the reversion of the land to another in fee, and the tenant for term of life attorn, &c. *if the rent be after behind, the grantee of the reversion may distrain for the rent, because that the rent is incident to the reversion; but he may not enter into the land and oust the tenant, as the lessor might have done, or his heirs, if the reversion had been continued in them, &c. And in this case the entry is taken away for ever; for the grantee of the reversion cannot enter, causa quâ suprà. And the lessor nor his heirs cannot enter; for if the lessor might enter, then he ought to be (126) in his former state, &c. and this may not be, because he hath aliened from him the reversion.*

(85)*

nor (at common law) by assignees in deed.

Here Littleton reciteth one of the maxims of the common law: 214 a. and the reason hereof is, for avoiding of maintenance, suppression (1 Eol. Abr. 47.) of right, and stirring up of suits: and therefore nothing in action, entry, or re-entry, can be granted over; for so, under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession.

"To the feoffor, or to the donor, &c. or to their heirs, &c." 214 b. Here is to be observed a diversity between a reservation of a rent and a re-entry; for (as it hath been said) a rent cannot be reserved to the heir of the feoffor, but the heir may take advantage of a condition, which the feoffor could never do. As if I infeoff another of an acre of ground, upon condition that if mine heir pay to the feeoffee, &c. twenty shillings, that he and his heirs shall re-enter, this condition is good; and if after my decease my heir pay the twenty shillings, he shall re-enter, for he is privy in blood, and enjoy the land as heir to me. Pl. Com. 312, 314. in Sco-lastice's case. (Hob. 130.) 15 E. 4. 14 a.

*ALSO, if lord and tenant be, and the tenant make a lease for term of life, rendering to the lessor and his heirs such an annual rent, and for default of payment a re-entry, &c. if after the lessor dieth without heir during the life of the tenant for life, whereby the reversion cometh to the lord by way of escheat, and after the rent of the tenant for life is behind, the lord may distrain the tenant for the rent *behind; but he may not enter into the land by force of the condition, &c. because that he is not heir to the (127) lessor, &c.* LITTLETON. [Sect. 348. 215 b.] or in law. (86)*

Note, here it appeareth, that the lord by escheat shall distrain for the rent, and yet the rent was reserved to the lessor and his heirs; but both assignees in deed and assignees in law shall have the rent, because the rent being reserved of inheritance to him and his heirs, is incident to the reversion, and goeth with the same. But if the rent were reserved to him and his assigns, and the lessor assigned over the reversion, and dieth, the assignee shall not have the rent 215 b. (F.N.B. 144b.) 19 E. 3. Res-celt 14.

(126) *en-a* in L. and M. and Roh.(127) *lessor-feoffor*, L. and M. and Roh.

(Ante, 1b.
47 a.)

after his decease, because the rent determined by his death, for that it was not reserved to him, his heirs and assigns.

"But he may not enter into the land by force of the condition, &c." Hereby it appeareth, that at the common law, neither assigns in deed nor assigns in law could have taken the benefit of either entry or re-entry, by force of the condition.

(p) 21 H. 7. 18.
17 Ass. 20.
19 E. 3. Gard.
113, 114. 18
Ass. pl. 18.
11b. 7. fol. 7.
The Earl of
Bedford's
case.

The guardian in chivalry (*p*) or in socage, shall, in the right of the heir, take benefit of a condition by entry or re-entry, by the common law, and so it is here implied.

214 b.
Secus as to
the succes-
sors of a
bishop, &c.;
21 H. 7. 18 a.
(Post, 46 b.)

Our author (sect. 347.) speaketh of natural persons for an example; for if a bishop, archdeacon, parson, prebend, or any other body politic or corporate, ecclesiastical or temporal, make a lease, &c. upon condition, his successor may enter for the condition broken, for they are privy in right.

or executors,
in respect of
leasehold
estates;

And so if a man have a lease for years, and demise or grant the same upon condition, &c. and die, his executors or administrators shall enter for the condition broken, for they are privy in right, and represent the person of the dead.

215 a.
(q) 27 H. 8. 1.

(*q*) If *cestuy que use* had made a lease for years, &c. upon condition, the feoffees should not enter for the condition broken, for they are privy in estate, but not privy in blood.

*214 b.
or as to a
stranger, in
case of limit-
ations,
(10 Rep. 42.)
(87)*
(Pl. 242 a.
1 Rol. Abr.
411. Post.
379 a.)

"For default of payment a re-entry, &c." Hereupon is to be collected divers diversities. First, between a condition *that requireth a re-entry, and a limitation that *ipso facto* determineth the estate without any entry. Of this first sort, no stranger, as Littleton saith, shall take any advantage as hath been said. But of limitations it is otherwise. As if a man make a lease *quousque*, that is, until I. S. comes from Rome, the lessor grant the reversion over to a stranger, I. S. comes from Rome, the grantee shall take advantage of it and enter, because the estate by the express limitation was determined (L 2).

(L 2) Between a condition and a limitation there is this difference:—A limitation marks the utmost time of continuance; a condition marks some event, which, if it happens in the course of that time, is to defeat the estate. Thus A. gives lands to B. for twenty years. In this case the estate may endure to the end of that period, so that it may be fully completed. The space of twenty years is the period for which the estate is to continue; and the words, appointing this to be the time of continuance, are called the limitation, from their ascertaining the boundary of the estate. But if a clause introduced by, and concluding in words of condition, is added, that if somewhat shall be done, or omitted by either of the parties, or by any other person in the meantime, that then the term of twenty years shall cease and be void, this is a clause of condition; and on the rise of the event on which the term is to cease, or be avoided, and a pursuit of title by entry or claim, the condition will put an end to the estate of the person to whom the limitation is made, and of all persons claiming under him, though the period to which it was extended in its limitation, is not yet arrived. Prest. Est. 22.

A condition, properly so called, annexed to an estate, differs from what is termed a conditional limitation in this, that it is the proper effect of a condition to give title, by the breach of it, to the grantor, or those claiming from him the reversion in the lands; a con-

So it is, if a man make a lease to a woman *quamdiu casta vixerit*, or if a man make a lease for life to a widow *si tamdiu in purâ viduitate viveret*. So it is, if a man make a lease for a hundred years, if the lessee live so long, the lessor grants over the reversion, the lessee dies, the grantee may enter, *causâ quâ suprad.*

Register 246.
Pl. Com. 27.
34 E. 3.
Formedon 66.
F. N. B. 201.
Lib. 10. 61. 36.
Mary Portington's case.

2. Another diversity is between a condition annexed to a freehold, and a condition annexed to a lease for years. For if a man make a gift in tail, or a lease for life, upon condition, that if the donee, or lessee, goeth not to Rome before such a day, the gift or lease shall cease or be void: the grantee of the reversion shall never take advantage of this condition, because the estate cannot cease before an entry; *but if the lease had been but for years, there the grantee should have taken advantage of the like condition, because the lease for years *ipso facto* by the breach of the condition without any entry was void; for a lease for years may begin without ceremony, and so may end without ceremony; but an estate of freehold cannot begin nor end without ceremony. And of a void thing a stranger may take benefit, but not of a voidable estate by entry.

or of a condition to make void a lease for years;
(Flo. 242 a.
Brooke, tit.
Condition in
Abr. 11 H. 7.
L'opinion de
Bromley.
10 E. 53.
10 Ass. pl. 24.
Pl. Com. 36.
11 H. 7. 17.
19 R. 2. Done
10. (1 Rol.
Abr. 475. Noy.
7. 3 Rep. 64 b.
65. 8 Rep. 95.
Post. 215 b.)
(88) *

Another diversity is in case of a lease for years, where the condition is, that the lease shall cease or be void, as is aforesaid, and where the condition is that the lessor shall re-enter, for there the grantee, as Littleton saith, shall never take benefit of the condition.

215 a.
(4 Rep. 52.
Post. 211 b.
1 Rol. Abr.
475. 3 Rep.
64.)

And it is to be observed, that where the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of the rent after can make it to have a continuance: otherwise it is of an estate or lease voidable by entry (128).

Pl. Com.
Browning's
case 136.

Another diversity is between conditions in deed, whereof sufficient hath been said before, and conditions in law. As if a man make a lease for life, there is a condition in law annexed unto it, that if the lessee doth make a greater estate, &c. that then the lessor may enter.

or as to a
condition in
law.

(128) Because the acceptance of rent cannot make a new lease, and the old one was determined; but the acceptance of the rent is a sufficient declaration, that it is the lessor's will to continue the lease, for he is not entitled to the rent but by the lease. [Note to the 11th edition.]

[Though acceptance of rent, as rent, by a remainder-man will not amount to a confirmation of a lease void as against him (Symon v. Butcher, Dougl. 51. Goodright, d. Carter v. Straphan, 1 Cowp. 201. Jenkins, d. Yale v. Church, 2 Cowp. 483.), yet it is

an admission of a tenancy from year to year, and the lessee will thereby be entitled to half a year's notice to quit. Doe, d. Martin v. Watts, 7 T. R. 88. Et vid. Denn, d. Brune v. Rawlins, 10 East, 261. But, in order to raise an implied tenancy from the receipt of rent, it must appear that the rent was paid and received as between landlord and tenant, and that it was not attributable to another consideration. Right v. Bauden, 3 East, 260. Et vid. 10 East, 189, 9. Doe v. Quigley, 2 Camp. N. P. C. 505.]-[Ed.]

ditional limitation limits the estate over to a stranger: and in the case of a conditional limitation the estate expires and determines of itself, without any act, as entry or claim, to be done or made by him who has the expectant interest: whereas in the case of a condition properly so called, advantage must be taken of the breach of it, by the activity of the grantor, his heirs, or assigns. 2 Woodd. 143, 4. 2 Bl. Com. 155. Fearn. Cont. Rem. 101. 400. The doctrine of remainders will be considered in the next chapter.—[Ed.]

Of this and the like conditions in law, which do give an entry to the lessor, the lessor himself and his heirs shall not only take benefit of it, but also his assignee, and the lord by escheat, every one for the condition in law broken in their own time.

(1 Saun. 227, 228, 239, 240, 241.)

(89)*
Construction
of th. stat.
32 H. 8. c. 34.
(*) 32 H. 8.
c. 34. in its
preamble.
(?) 36 H. 6. tit.
Entre cog. 49.

(Flo. 175 b.)

Another diversity there is between the judgment of the common law, whereof Littleton wrote, and the law at this *day, by force of the statute (*) of 32 H. 8. c. 34. (M 2) (r). For by the common law no grantee or assignee of the reversion could (as hath been said) take advantage of a re-entry by force of any condition. For at the common law, if a man had made a lease for life, reserving a rent, &c. and if the rent be behind a re-entry, and the lessor grant the reversion over, the grantee should take no benefit of the condition, for the cause before rehearsed. But now by the said statute of 32 H. 8. the grantee may take advantage thereof, and upon demand of the rent and non-payment, he may re-enter. By which act it is provided, that as well every person which shall have any grant of the king of any reversion, &c. of any lands, &c. which pertained to monasteries, &c. as also all other persons being grantees or assignees, &c. to or by any other person or persons, and their heirs, executors, successors, and assignees, shall have like advantage against the lessees, &c. by entry for non-payment of the rent, or for doing of waste, or other forfeiture, &c. as the said lessors or grantors themselves ought or might have had. Upon this act divers resolutions and judgments have been given, which are necessary to be known.

(s) Pl. Com.
Hill and
Grange's
case, 175, 176.
M. 10 & 11
Elix. 180.
Dier. Ibid.
14 Elix. Dyer
309. Wyn-
tar's case.

1. That the said statute is general, viz. (s) that the grantee of the reversion of every common person, as well as of the king, shall take advantage of conditions.

2. That the statute doth extend to grants made by the successors of the king, albeit the king be only named in the act.

3. That where the statute speaketh of lessees, that the same doth not extend to gifts in tail.

(90)*
Who entitled
to enter as
assignees
within this
statute, or
not.
(s) Pl. Com.

4. That where the statute speaks of grantees and assignees of the reversion, (t) that an assignee of part of the state of the reversion may take advantage of the condition. As if lessee for life be, &c. and the reversion is granted for life, &c. So if lessee for years, &c. be, and the reversion is granted for years, the grantee for

(M 2) This statute was occasioned by the dissolution of religious houses. At common law covenants in leases, like other covenants, could only operate between the parties and their privies; that is, those who were heirs or executors to the covenantors or the covenantees; so that grantees of reversions of lands held of religious houses, could not avail themselves of the benefit of covenants in leases granted to their tenants: and tenants, on the other hand, were deprived of advantages stipulated by their former landlords. The first provision on this head was the statute 31 H. 8. c. 13. which gave the king all advantage, whether of covenants, conditions, or the like, as the lessor would have had. By stat. 32 H. 8. c. 34. this was extended to the grantees of the king; and further, to make this equitable remedy universal, mutual redress is given, in all cases of landlord and tenant, where the former grants his reversion to another. 4 Reev. Hist. 234, 5.—[Ed.]

years shall take benefit of the condition, in respect of this word (*executors*) in the act.

Eliz. 308. (1 Rol. Abr. 472. Post. 365 a. Ante, 148 a. 1 Rol. Abr. 471. Mo. 93.)
 Simile adjudged in *Communi Banco* in the Lord Dyer's time. Pasch. 17 Eliz. Mich. 14 & 15 Eliz. Dyer 308. adjudged *Winter's case*.

Kidwell's case, 60.
 Vid. Dyer.
 Mich. 14 & 15
 Vid. 7 E. 3. 54.

5. That a grantee of part of the reversion shall not (*u*) take advantage of the condition. As if the lease be of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire and against common right.

(u) Lib. 5.
 fol. 54.
Knight's case.
Winter's case,
 ubi supra.
Knight's case,
 ubi supra.

6. That in the king's case, the condition in that case is not destroyed, but remains still in the king.

7. By act in law a condition may be apportioned in the case of a common person; as if a lease for years be made of two acres, one of the nature of borough English, the other at the common law, and the lessor, having issue two sons, dieth, each of them shall enter for the condition broken: and likewise a condition shall be apportioned by the act and wrong of the lessee, as hath been said in the Chapter of Rents (A).

Lib 4. fol. 120.
Dumper's case.

(4 Lec. 27, 28,
 29, 30. Mo.
 202, 203.)

8. If a lease for life be made, reserving a rent upon condition, &c. the lessor levies a fine of the reversion, he is grantee or assignee of the reversion; but without attornment he shall not take advantage of the condition, for the makers of the statute intended to have all necessary incidents observed, otherwise it might be mischievous to the lessee (129).

Resolved in
Duke's case.
 Pasch. 30 El.
 in *Communi Banco*.
Malorie's case,
 lib. 5. 112 b.

9. There is a diversity between a condition that is compulsory, and a power of revocation that is voluntary; for a man that hath a power of revocation may by his own act extinguish his power of revocation in part, as by levying of a fine of part; and yet the power shall remain for the residue, because it is in nature of a limitation, and not of a *condition; and so it was resolved (*w*) in the Earl of Shrewsbury's case, in the court of wards, P. 39 Eliz. and Mich. 40 & 41 Eliz.

(1 Rol. 472.
 Hob. 313.
 Post. 227.
 265 b. 1 Rep.
 112, 113.)

(91)*
 (w) 14 Eliz.
 Dyer 39.

10. If the lessor bargain and sell the reversion by deed indented and enrolled, the bargainee is not in the *per* by the bargainor, and yet he is an assignee within the statute. *So if the lessor grant the reversion in fee to the use of A. and his heirs, A. is a sufficient assignee within the statute, because he comes in by the act and limitation of the party, albeit he is in the *post*, and the words of the statute be, *to or by*, and they be assignees to him, although they be not by him: but such as come in merely by act in law, as the lord

(1 Rep. 173 b.
 4 Rep. 119 b.)
 (1 Rol. Abr.
 422.) (3 Rep.
 62 b.)
 *215 b.

(129) Attornment being taken away per 4 & 5 Ann. c. 16. the law seems to be otherwise now. [Note to the 11th edition.]

(A) See ante, 148. b. near the end.

of the villain, the lord by escheat, the lord that entereth or claimeth for mortmain, or the like, shall not take benefit of this statute.

Lib. 5. fol. 113.
Mallorie's
case. Lib. 8.
fol. 92.
Frances'
case. (Cro.
Jac. 9. 1 Rol.
46.)

11. If the lessor in the case before bargain and sell the reversion by deed indented and enrolled, or if the lessor make a feoffment in fee, and the lessee re-enter, the grantee or feoffee shall not take any advantage of any condition, without making notice to the lessee.

And so was
it resolved in
Winter's
case, Mich.
14 & 15 Eliz.
in Communi
Banco, and
oftentimes
since. Vid.
Dyer 309.
(Flo. 242.
1 Saun. 240
1 Leo. 62.)

12. Albeit the whole words of the statute be, for non-payment of the rent, or for doing of waste or other forfeiture, yet the grantees or assignees shall not take benefit of every forfeiture, by force of a condition, but only of such conditions as either are incident to the reversion, as rent, or for the benefit of the state, as for not doing of waste, for keeping the houses in reparation, for making of fences, scouring of ditches, for preserving of woods, or such like, and not for the payment of any sum in gross, delivery of corn, wood, or the like, so as other forfeiture shall be taken for other forfeitures like to those examples which were there put, *viâlicit*, of payment of rent, and not doing of waste, which are for the benefit of the reversion (130).

201 b.
2. Circum-
stances re-
quisite to en-
title a party
to take ad-
vantage of a
condition
broken.

Littleton, (sect. 325.) saith, *If the rent be not paid at such time, then may the feoffor or his heirs enter, &c.* By this section, and by the (&c.) therein contained, six things are to be understood.

*First, where our author saith, *if the rent be behind*, that though the rent be behind and not paid (x), yet if the feoffor doth not demand the same, &c. he shall never re-enter (N 2), because the land

Demand (when necessary): (x) 40 Ass. 11. 20 H. 5. 30. 31. 6 H. 7. 7. 19 H. 6. 76. 20 H. 6. 32.
22 H. 6. 46. Pl. Com. Kidwely's case, fol. 70. and Hill and Grange's case, fol. 73. (Noy. 23.
1 Rol. Abr. 469 460. Perk. sect. 827. Noy. 23.)

(130) "It has also been held upon this statute, that if a man makes a lease for years upon condition, that if the rent should be in arrear, it should be lawful to the lessor and his assigns to re-enter, and then the lessor assigns the reversion over, and the lessee attorns, and the lessor dies, the grantee shall not take advantage of the condition for want of these words '*his heirs*,' in the reservation of the condition; the condition being that he and his assigns shall enter. By Brown, serj. who moved the case in C. B. *ex relatione* T. Hurst.—It appears, therefore, that this reservation of condition is to be resembled to such a reservation of rent as is mentioned in page 47 a. which determined by the death of the lessor; but that nevertheless the grantee shall have advantage of the condition, during the life of the grantor, by the 32 H. 8. Supra 215 b. So note, the grantee of part of the reversion in the whole shall take advantage of a condition; for to this purpose the grantee of a reversion for life or years is an assignee within the 32 H. 8. who may enter; which,

nevertheless, is very different in the case of a warranty; for a lessee for life, who has but a part of the estate in the whole, is not assignee for voucher. Infra 385 b. On the other hand, the grantee of the whole estate in reversion in part is not an assignee within the 32 H. 8: as if the reversioner in fee of four acres grants two acres in fee, the grantee cannot enter; which also is very different in the case of warranty, for the feoffee of two acres is an assignee for voucher. Infra 315 a."—Lord Nott. MSS.

If a mortgagor and mortgagee make a lease in which the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, and therefore do not run with it. *Webb v. Russell*, 3 T. R. 393. In the former case, the mortgagor may maintain an action on the breach of the covenant. *Stokes v. Russell*, 3 T. R. 678. 1 H. Bl. 562. *Butler*. Note 118.

(N 2) See acc. 2 Ld. Raym. 750. 1 Salik. 250. 3 Burr. 1896, 7. So it is if there be a *nomine penæ* given to the lessor for non-payment, the lessor must demand the rent before

is the principal debtor ; for the rent issueth *out of the land, and in an assise for the rent the land shall be put in view ; and if the land be evicted by a title paramount, the rent is avoided, and after such eviction the person of the feoffee shall not be charged therewith, for the person of the feoffee was only charged with the rent in respect of the grant out of the land. (93)*

Secondly, the demand must be made upon the land, because the land is the debtor, and that is the place of demand appointed by law (1). where to be made;

• If the king maketh a lease for years, rendering a rent payable at his receipt at Westminster, and after the king granteth the reversion to another and his heirs, the grantee shall demand the rent upon the land, and not at the king's receipt at Westminster ; for as the law without express words doth appoint the lessee in the king's case to pay it at the king's receipt (o 2), so in case of a subject, the law appoints the demand to be on the land (3). Lib. 4. fol. 72, 73. Borough's case.

he can be entitled to the penalty ; or if the clause be, that if the rent be behind, the estate of the lessee shall cease and be void ; because the presumption is, that the lessee is attendant on the land, to save his penalty and preserve his estate ; and therefore shall not be punished without a wilful default, which cannot be made appear without a demand be proved, and that it was not answered. Hutt. 42. 114. Hob. 207. 331. 7 Co. 56 b. But where the remedy for recovery of the rent is by distress, there needs no demand previous to the distress, though the deed says, that if the rent be behind, being lawfully demanded, the lessor may distrain, for the very taking of the distress is a legal demand. Hob. 207. Moor, 883. Ante, 144 a. vol. 1. p. 446. Also where the power of re-entry is given to the lessor for non-payment, without any demand, there no demand is necessary. Dyer, 686. 5 Co. 40 b. And it is now held, that on an ejectment brought for non-payment of rent, an actual entry is not necessary. Salk. 259. Bull. N. P. 102. And by the 4 Geo. 2. c. 28. s. 2. in all cases between landlord and tenant, as often as one half year's rent shall be in arrear, the landlord having a right by law to re-enter for non-payment of rent, may, without any formal demand or re-entry, serve a declaration in ejectment for recovery of the demised premises ; and shall recover judgment and execution in the same manner as if the rent in arrear had been lawfully demanded, and re-entry made. And if the lessee or other person claiming under the lease, suffers judgment to be recovered, and execution executed, without paying the rent and arrears with costs, and without filing any bill for relief in equity within six calendar months after such execution executed, he shall be barred from all relief in law or equity, other than by writ of error.

On the construction of this statute, it has been decided, in a recent case, that though the lease contain the words, "being lawfully demanded," yet the lessor may bring an ejectment without any demand, provided he has a right of re-entry, and there was half a year's rent in arrear, and no sufficient distress on the premises. *Doe, d. Scholefield v. Alexander*, 2 Maul. & S. 525. Et vid. *Doe, d. Smelt v. Fuchau*, 15 East, 286.—[Ed.]

(1) [To the place of performing the condition, see Litt. Sect. 340. and the commentary on that section.]

(o 2) If the king makes a lease reserving rent, the tenant must pay it without demand, as is said, either to his receiver for that purpose, or at the receipt of the exchequer, as well as if by the words of the lease the rent had been made payable at his exchequer, or into the hands of his receiver. 4 Co. 73. Cro. Eliz. 462. Mod. 404. Dyer, 87. *So the king shall take advantage of a condition for re-entry on non-payment of rent, without demand, though the lessor under whom the king claims, could not re-enter for default of payment of the rent without a demand made. *Knight's case*, 5 Co. 56 a, b.—[Ed.]

(3) [The prior of St. John Jerusalem made a lease for years, reserving rent, with a condition of re-entry, and afterwards surrendered the priory, and all its possessions to the king. The judges were of opinion that the king, by reason of his prerogative, might take advantage of the condition without demand, though the prior himself could not. 5 Rep. 56 a, b. *Butler*. Note 86.]

49 Ass. 5.
16 Ellis. Dyer
328.

If there be a house upon the same, he must demand the rent at the house. And he cannot demand it at the back-door of the house but at the fore-door, because the demand must ever be made at the most notorious place. And it is not material whether any person be there or no.

(y) Bendloes
on Tre. 4 &
5 Ph. & Mary.

Albeit the feoffee be in the hall or other part of the house, yet the feoffor need not (y) but come to the fore-door, for that is the place appointed by law, albeit the door be open.

202 a.
(z) 15 Ellis.
Dyer 328.
(Ante 146 a.)

(z) If the feoffment were made of a wood only, the demand must be made at the gate of the wood, or at some highway leading through the wood, or other most notorious place. And if one place be as notorious as another, the feoffor hath election to demand it at which he will, and albeit the feoffee be in some other part of the wood ready to pay the rent, yet that shall not avail him. *Et sic de similibus.*

(94)*

Thirdly, and if the feoffor demand it on the ground at a place which is not most notorious, as at the back-door of a house, &c. and in pleading the feoffor allege a demand of the rent generally at the house, the feoffee may traverse the demand, and upon the evidence it shall be found for him, for that it was a void demand.

Lib. 4. Bo-
roughs s
case. fol. 73.
Pl. Com. 70.

Fourthly, if the rent be reserved to be paid at any place from the land, yet it is in law a rent, and the feoffor must demand it at the place appointed by the parties, observing that which hath been said before concerning the most notorious place.

(Post. 211 a.)

Fifthly, and all this is to be understood when the feoffee is absent, for if the feoffee cometh to the feoffor at any place upon any part of the ground at the day of payment, and offer his rent, albeit they be not at the most notorious place, nor at the last instant, the feoffor is bound to receive it, or else he shall not take any advantage of any demand of the rent for that day (1).

and at what
time.)
(7 Rep. 28.)

Sixthly, therefore, the place of demand being now known, it is further to be known what time the law hath appointed for the same. This partly appeareth by that which hath been last said. For albeit the last time of demand of the rent is such a convenient time before the sun-setting of the last day of payment, as the money may be numbered and received, notwithstanding, if the tender be made to him that is to receive it upon any part of the land at any time of the last day of payment, and he refuseth, the condition is saved for that time; for by the express reservation the money is to be paid on the day indefinitely, and convenient time before the last instant, is the uttermost time appointed by law, to the intent (131) that then both

(5 Rep. 114b.)

(2 Cro. 482,
500.)

(131) Yet the rent is not due till the last minute of the natural day; for if the lessor dies after sun-set, and before midnight, the rent shall go to the heir, and not to the exe-

cutors. 1 Saund. 287. Salk. 578. [Note to the twelfth edition.]

[See ant. vol. 1. p. 486. n. (s 1).]—[Ed.]

(1) For the difference of the demand to be made in case of a re-entry to avoid an estate,

parties should meet together, the one to demand and receive, and the other to pay it, so as the one *should not prevent the other. But if the parties meet upon any part of the land whatsoever on the same day, the tender shall save the condition for ever for that time. (95)*

And if the reservation of the rent be (as here Littleton putteth the case) at certain feasts, with condition that if it happen the rent to be behind by the space of a week after any day of payment, &c. in this case the feoffor needeth not demand it on the feast day, but the uttermost time for the demand is a convenient time (as hath been said) before the last day of the week, unless before that the feoffee meet the feoffor upon the land, and tender the rent as is aforesaid (r 2). Lib. 5. fol. 114. Wade's case. Pl. Com. Hill & Grange's case, 167. 172. 20 H. 6. 30. 31. 6 H. 7. 3.

If a rent be granted payable at a certain day, and if it be behind and demanded, the grantee shall distrain for it, in this case the grantee need not demand it at the day; but if he demand it at any time after, he shall distrain for it, for the grantee hath election in this case to demand it when he will, to enable him to distrain (*). Mich. 40 & 41 Eliz. inter Stanley and Read. Lib. 7. fol. 28. Maunde's case.

Regularly, when any man will take advantage of a condition, if he may enter, he must enter, and when he cannot enter he must make a claim; and the reason is, for that a freehold and inheritance shall not cease without entry or claim, and also the feoffor or grantor may waive the condition at his pleasure. 218 a. Entry or claim. Pl. Com. Browning and Benton's case, 133 b. (2 Rep. 53 b.)

As if a man grant an advowson to a man and to his heirs upon condition, that if the grantor, &c. pay twenty pound on such a day, &c. the state of the grantee shall cease or be utterly void (q 2), the grantor payeth the money, yet the state is not reverted in the grantor before a claim, and that claim must be made at the church. (a) And so it is of a reversion or remainder, of a rent, or common, or the like, vid. Littleton, cap. Villain. (a) Pl. Com. Browning's case, 133 b.

or the forfeiture of a sum *nomine pæne*, and of the demand to be made in case of an entry to distrain, see before, 144 a.

(r 2) Such condition, however, is not saved by the attendance of the lessee with the rent merely on the first day of payment, for if the lessor be not then there to receive it, the lessee must equally attend on the last day. 10 Co. 129 a. Plow. 70. a, b. 4 Bac. Abr. 220. But in case of a rent payable on a particular day, or within a certain time after, it is sufficient, if the lessee attend at the land on the first day of payment; and if the lessor do not attend there to receive it, the condition is saved. But in both cases a tender of the rent at any day, within the stipulated number of days, to the lessor himself, although it be off the premises, is sufficient. *Cropp v. Hambleton*, 1 Cro. Eliz. 48. Plowd. 70 a, b. 10 Co. 129 a. And now by the before-mentioned stat. of 4 Geo. 2. c. 28. s. 4. it is provided, that if the tenant, at any time before the trial in ejectment, (see *Roe v. Davis*, 7 East, 363.), pays or tenders to the lessor or landlord, or pays into court all the arrears of rent with the costs, the proceedings in ejectment shall cease. Before this statute both the courts of law and the courts of equity had exercised a discretionary power of staying the lessor from proceeding at law, in cases of forfeiture for non-payment of rent, by compelling him to take the money due to him. See the opinion of Lee, C. J. in *Archer v. Snapp*, Andr. 341. Et vid. Bull. N. P. 97. 2 Salk. 597. 8 Mod. 345. 10 Mod. 383. 2 Vern. 103. 1 Wils. 75. 2 Stra. 900. Where an ejectment is brought, on the preceding statute, for the forfeiture of a lease, acceptance of rent afterwards, by the landlord, has been held to be a waiver of the forfeiture; for it is a penalty, and, by accepting the rent, the penalty is waived. Per Ashton, J. in *Doe v. Batten*, Cowp. 247.—[Ed.]

(*) Ante, 144 a. vol. 1. p. 447.—[Ed.]

(q 2) See acc. 2 Co. 50. 2 And. 8. 3 Com. Dig. 130. Condition (o 5).—[Ed.]

there must be a claim before the state be revested in the grantor by force of the condition, and that claim must be made upon the land.

42 E. 3. 1.

A fortiori, in case of a feoffment which passeth by livery of seisin, there must be a re-entry by force of the condition before the state be void.

Lib. 2. fol. 50.
Sir Hugh
Cholmley's
case.

If a man bargaineth and selleth land by deed indented and inrolled, with a proviso, that if the bargainor pay, &c. that then the state shall cease and be void, he payeth the money, the state is not revested in the bargainor before a re-entry (τ 2). And so it is, if a bargain and sale be made of a reversion, remainder, advowson, rent, common, &c. And so it is, if lands be devised to a man and to his heirs upon condition, that if the devisee pay not twenty pound at such a day, that his estate shall cease and be void, the money is not paid, the state shall not be vested in the heir before an entry. And so it is, of the reversion or remainder, an advowson, rent, common, or the like (s 2).

(6 Rep. 34 a. b.
Flo. 22.)

But the said rule hath divers exceptions.

Exceptions
to the rule re-
quiring en-
try. Vid. lib.
1. fol. 174.
Dig's case.
20 E. 4. 18. 19.

First, in the case of Littleton (sect. 350.) (τ 2), for that he can make no entry, he shall not be driven to make any claim to the reversion; for seeing by construction of law the freehold and inheritance passeth maintainment out of the lessor; by the like construction, the freehold and inheritance by the default of the lessee shall be revested in the lessor without entry or claim.

(97)*
Pl. Com.
Browning's
case, 133 b.
20 E. 4. 19.

*2. If I grant a rent-charge in fee out of my land upon condition, there if the condition be broken, the rent shall be extinct in my land, because I (that am in possession of the land) need make no claim upon the land, and therefore the law shall adjudge the rent void without any claim.

20 E. 4. 19.
20 H. 7. 4 b.
(4 Rep. 53.)
(1 Rep. 97.)
*218 b.

3. If a man make a feoffment unto me in fee, upon condition that I shall pay unto him twenty pound at a day, &c. before the day I let unto him the land for years, reserving a rent, and *after fail of payment, the feoffee (A) shall retain the land to him and to his heirs, and the rent is determined and extinct, for that the feoffor could not enter, nor need not claim upon the land, for that he himself was in possession.

(α 2) Adj. 2 Co. 53 b. Et vid. 1 Co. 174 a.—[Ed.]

(s 2) [The entry or claim may be made either by the party himself, or by a stranger by his order. 2 Cro. 57.] An entry by a stranger without authority is good, if it be assented to afterwards; and it will support an ejectment, if the assent be before the demise in the ejectment. *Fitchel v. Adams*, Stra. 1128.—[Ed.]

(τ 2) The case put by Littleton in sect. 350. is as follows: "If a lease be for five years, upon condition, that if the lessee within two years pays 20*l.* he shall have the fee, and livery is made, the lessee has a fee conditional." Ant. p. 11. In this case, on the lessee failing to pay, the fee shall be revested in the lessor without entry; because he cannot enter during the term.—[Ed.]

(A) The sense appears to require that Lord Coke should have used the word feoffor here instead of feoffee. See Mr. Riise's Intro. p. 119. Note to 18th Edit. Lond. 1823.

sion, and the condition being collateral is not suspended by the lease, otherwise it is of rent reserved.

4. If a man by his deed, in consideration of fatherly love, &c. covenant to stand seised to the use of himself for life, and after his decease to the use of his eldest son in tail, the remainder to his second son in tail, the remainder to his third son in fee, with a proviso of revocation, &c. the father doth make a revocation according to the proviso, the whole estate is *maintenant* re-vested in him without entry or claim, for the cause aforesaid.

Lib. 1. 174.
Digge's case.
(Parl. Rot.
237 a. 265 b.
Ante, 215 a.)

BUT in such cases of feoffment upon condition where the feoffor may lawfully enter for the condition broken, &c. (132) there the feoffor hath not the freehold before his entry, &c. (133).

LITTLETON.
[Sect. 351.
218 b.]

This upon that which hath been said is evident, and needeth no further explanation.

218 b.

Regularly it is true, that he that entereth for a condition broken shall be seised in his first estate, or of that estate which he had at the time of the estate made upon condition, but yet this faileth in many cases.

202 a.
9. On entry for condition broken, the party is seised in his former estate.
8 H. 7. 7 b.

1. In respect of impossibility. As if a man seised of *lands in the right of his wife maketh a feoffment in fee by deed indented, upon condition that the feoffee should demise the land to the feoffor for his life, &c. the husband dieth, the condition is broken; in this case the heir of the husband shall enter for the condition broken, but it is impossible for him to have the estate that the feoffor had at the time of the condition made; for therein he had but an estate in the right of his wife which by the (A) coverture was dissolved. And therefore, when the heir hath entered for the condition broken, and defeated the feoffment, his estate doth vanish, and presently the state is vested in the wife.

Exceptions to this rule; in respect of impossibility;
(98)*
4 H. 6. 2. lib. 8.
fo. 43. 44.
Whittingham's case.
5 H. 7. 6 a.
(Post. 287 b.)

2. In respect of necessity. If *Cestuy que use* after the statute of R. 3. and before the statute of 27 H. 8., had made a feoffment in fee upon condition, and after had entered for the condition broken; in this case he had but an use when the feoffment was made, but now he shall be seised of the whole state of the land. So that as in the former case, the ancestor had somewhat at the making of the condition, and the heir shall have nothing when he hath entered for the condition broken; so in this case the feoffor had no estate or interest in the land at the time of the condition made, but a bare use; yet, after his entry for the condition broken, he shall be seised of the whole state in the land, and that also for necessity; for by the feoff-

or of necessity;

(139) *la-Pou* in L. and M. and Roh. void or continue the estate of the feoffee,
(133) For till entry it doth not appear; which he will do. [Note to the 11th edition.]
the feoffor having power at his election to

(A) *The text should read, it seems, as if Lord Coke had said, which by the determination of the coverture. Note to the 18th Edit. Lond. 1823.*

ment in fee of *Cestuy que use*, the whole estate and right was divested out of the feoffees. And therefore of necessity the feoffor must gain the whole estate by his entry for the condition broken.

Tenant in special tail hath issue, and his wife dieth, tenant in tail maketh a feoffment in fee upon condition, the issue dieth, the condition is broken, the feoffor re-enters, he shall *have but an estate for life, as tenant in tail *apres possibility* of issue extinct by the re-entry, and yet he had an estate tail at the time of the feoffment, and that also for necessity.

or as to some collateral qualities; (Ante, 103 a.)

(99)*

3. In some cases the feoffor by his re-entry shall be in his former estate, but not in respect of some collateral qualities. As if tenant by homage ancestrel maketh a feoffment in fee upon condition, and entereth upon the condition broken, it *shall never be holden by homage ancestrel again. And so it is, if a copyhold escheat, and the lord make a feoffment in fee upon condition, and entereth for the condition broken. And the reason in both these cases is, for that the custom or prescription for the time is interrupted.

15 Ass. 12.
(4 Rep. 9 b.)

(1) Lord and tenant by fealty and rent, the lord is in seisin of his rent, the lord granteth his seignory to another and to his heirs upon condition, the tenant attorneth and payeth his rent to the grantee, the condition is broken, the lord distraineth for his rent, and rescous is made, he shall be in his former estate, and yet the former seisin shall not enable him to have an assise (v 2) without a new seisin.

8 H. 7. 7.

(Post, 360 b.)

If tenant in tail make a feoffment in fee upon condition, and dieth, the issue in tail within age doth enter for the condition broken, he shall be first in as tenant in fee-simple as heir to his father, and consequently and instantly he shall be remitted. But if the heir be of full age he shall not be remitted, because he might have had his *formedon* against the feoffee, and the entry for the condition is his own act; but more shall be said hereof in his proper place, in the Chapter of Remitter.

2 H. 6. 4.
(1 Rol. Abr. 412.)

If a man make a feoffment in fee of Black Acre and White Acre, upon condition, &c. and for breach thereof that he shall enter into Black Acre, this is good.

43 Ass. 47.
13 E. 4. 4.
2 H. 5. 7 b.
39 Ass. 15.

If tenant for life make a feoffment in fee upon condition, and entereth for the condition broken, he shall be tenant for life again,

(1) This is seemingly contradicted by the authorities cited in the margin. In that taken from Lord Coke's Reports, it is said, "If the lord grants his seignory on condition, and the tenant pays the rent to the grantee, and afterwards the condition is broken, and the lord distrains for the services, upon rescous he shall have assise, for the seisin before is sufficient."—The case reported in the margin from the book of assises is to the same effect. But it is to be observed, that, when the lord distrains, his distress amounts to a new entry. This may seem to reconcile the apparent contradiction, in this instance, between the commentary and the authorities cited in the margin. *Butler. Note 89.*

(v 2) Contra 4 Co. 9 b. And the reason there given is, that in the case of rent, the distress is in lieu of an entry. Vid. 15 E. 3. Ass. 95. & 15 Ass. 12. Brook. Seisin. 38. 2 Rol. 465.—[Ed.]

but subject to a forfeiture, for the state is reduced, but the forfeiture is not purged (w 2).

**BUT where a feoffment is made of certain lands, reserving a certain rent, (134) &c. upon such condition, that if the rent be behind, (135) that it shall be lawful for the feoffor and (136) his heirs to enter (137), and to hold the land, until he be satisfied or paid the rent behind, &c. in this case if the rent be behind, and the feoffor or his *heirs enter, the feoffee is not altogether excluded from this (138), but the feoffor shall have and hold the land, and thereof take the profits, until (139) he be satisfied of the rent behind; and when he is satisfied, then may the feoffee (140) re-enter into the same land, and hold, (141) it as he held it before. For in this case, the feoffor shall have (142) the land but in manner as for a distress, until (143) he be satisfied of the rent, &c. though (144) he take the profits in the mean time (145) to his own use, &c.*

11 H. 5. 26.
16 Ass. 47.
(1 Rol. Abr.
856. Post.
252 a.)
(100)*
LITTLETON.
[Sect. 327.
202 b.]
or in case of
a special con-
dition to en-
ter and hold
till payment.
*203 a.

"And to hold the land until he be satisfied or paid the rent behind, &c." By this it is implied, that if such a feoffment be made, reserving, (b) for example, eight marks rent at the feast of Easter, with such a condition as is aforesaid, the feoffor at the feast day demands the rent, the feoffee payeth, unto him six marks parcel of the rent, the feoffor entereth into the lands, and taketh the profits towards satisfaction. Afterwards the feoffee doth tender the two marks residue of the rent to the feoffor upon the land, who refuseth it. It

202 b.
Vid. sect. 32.
19 E.
Bere 250.
19 R. 2. done
rent 10. Pl.
Com. 524.
(b) 20 E. 3.
tit. Covenant
3.

- | | |
|--|---|
| (134) <i>Esc.</i> not in L. and M. | (141) <i>come-coment</i> in L. and M. and Roh. |
| (135) <i>if</i> added in L. and M. | (142) <i>avera la terre-ceo aver</i> in L. and M. |
| (136) <i>a</i> added in L. and M. | and Roh. |
| (137) <i>en la terre tenu de eux</i> in L. and M. | (143) <i>que</i> added in L. and M. and Roh. |
| (138) <i>de</i> added in L. and M. and Roh. | (144) <i>que</i> not in L. and M. nor Roh. |
| (139) <i>que</i> added in L. and M. and Roh. | (145) <i>a son use demone</i> not in L. and M. |
| (140) <i>re-entrer-entre</i> in L. and M. and Roh. | nor Roh. |

(w 2) If a tenant for life, with contingent remainder over, makes a feoffment in fee upon condition, and the contingency happens before the condition is broken, the remainder is destroyed; but if the tenant for life enters for the condition broken, before the contingency happens, the contingent remainder will be revived, and the contingency, if it happens, may vest. See *Thompson v. Leach*, 1 Ld. Raym. 314. S. P. Salk. 577. Fearn. Cont. Rem. 509, 510.

With respect to the effect of an entry for a condition broken:—As the entry of the feoffor on the feoffee for the breach of a condition defeats the estate to which the condition was annexed, so it defeats all rights and incidents annexed to that estate, as dower and curtesy, and all charges and incumbrances created by the feoffee, during his possession. For, upon the entry of the feoffor, he becomes seised of an estate paramount to that which was liable to those charges. 1 Rol. Abr. 474.

With regard to conditions in general, it may be further observed, 1st. That a condition must defeat the whole estate. Ante, note (r), p. 33. 2d. That a condition being entire cannot, in general, be apportioned by the act of the parties, 4 Co. 120. 5 Co. 54.; though it may be apportioned by act of law, or by act and wrong of the lessee. Ante, 215 a. p. 90. 3d. That a condition may be good for part, and void for the rest. Ante, n. (p), 25. Post, 379 b. 4th. That where an estate is given upon condition, the taking possession of the land to which the condition is annexed, binds to the performance of the condition, even though such performance should be attended with loss. *Duke of Montague v. Beaulieu*, 3 Bro. P. C. 277. *Attorney-General v. Christ's Hospital*, 3 Bro. C. C. 165. *Attorney-General v. Andrew*, 3 Ves. jun. 633.—[Ed.]

*203 a.
(101)*

(Autrement
in case de
obligation on
debt sur con-
tract. Doc.
Pla. 109.)

*hath been adjudged, that the feoffee upon the refusal may enter into the land; for when the feoffor is satisfied, either by *perception of the profits, or by payment, or tender and refusal, or partly by the one and partly by the other, the feoffee may re-enter into the land. And this is within the words of Littleton, viz. "*until he be satisfied*." And albeit the feoffor had accepted part of his rent, yet he may enter for the condition broken, and retain the land until he be satisfied of the whole (x 2). All which is worthy of observation.

(Sid. 223. 262.
344. Plow.
524b.)

"*In this case the feoffor shall have the land but in manner as for a distress, until he be satisfied, &c.*" By this it appeareth, that the feoffor by his re-entry gaineth no estate of freehold (x 2), but an interest by the agreement of the parties to take the profits in nature of a distress. And therefore if a man maketh a lease for life, with a reservation of a rent, and such a condition, if he enter (upon) the condition broken, and take the profits of the land *quousque*, &c. he shall not have an action of debt for the rent *arere*, for that the freehold of the lessee doth continue: and therefore the book (c) that seemeth to the contrary is false printed, and the true case was of a lease for years, as it appeareth afterwards in the same page of the leaf.

(c) 2 E. 3.
fol. 7.

But herein also a diversity worthy the observation is implied, viz. If a man make a lease for years, reserving a rent, with a condition, that if the rent be behind, that the lessor shall re-enter and take the profits, until thereof he be satisfied, there the profits shall be counted as parcel of the satisfaction, and during the time that he so taketh the profits, he shall not have an action of debt for rent, for the satisfaction whereof he taketh the profits. But if the condition be, that he shall take the profits until the feoffor (A) be satisfied or paid of *the rent, without saying (thereof), or to the like effect, there the profits shall be accounted no part of the satisfaction, but to hasten the lessee to pay it, and, as Littleton here saith, that until he be satisfied, he shall take the profits in the meantime to his own use (z 2) (1).

(102)*
30 E. 3. 7.
Vid. Sembla-
ble. 27 H. 8.
4. 43 E. 3. 21.
31 Ass. pl. 26.
Vid. le Stat.
de Merton,
cap. 6. and
observe these
words, quod
inde perci-
pere possint
duplicem va-
lorem, &c.
Et c. 7 with-
out this word
(inde). See
ante, 82b.

(x 2) That a previous demand is necessary in this case, as well as where the entry is general, see Hob. 82. 133. 208. And to entitle himself to the penalty, Lord Hobart thought that there must also be a demand of the rent on the day after it became due. Ibid. Et vid. 6 Bac. Abr. 40.—[Ed.]

(y 2) For the freehold continues in the feoffee. 3 Com. Dig. 130. And so it is, though the condition be, "that the feoffor his heirs and assigns shall enter," &c. *Jemott v. Cowley*, 1 Saund. 112. 1 Sid. 344. Ray. 136. 158. And if the feoffor enters, his interest goes to his executors. 1 Sid. 223. 262. 344, 5. But, in this case, he who enters may maintain an ejectment; for he has an interest sufficient to enable him to make a lease for trial of the title. 1 Lev. 170. 1 Sid. 345. 1 Saund. 112. 3 Com. Dig. 130. (o 4). So a fine levied to the grantee of a rent-charge, with a power limited by way of use, to enter on non-payment of the rent, "and retain until he be fully satisfied," conveys to him *on entry* an estate in possession, of which his lessee may maintain an ejectment; for it is *quasi* a conditional inheritance until the rent be paid: *Haverhill v. Hare*, 2 Cro. Jac. 511.—[Ed.]

(A) The word feoffor seems to be here inserted for lessor. See *Mr. Rilsø's Intr.* p. 119. Note to the 18th Edit. Lond. 1823.

(1) See *Mr. Butler's* note at the end of the volume. Note 9.

(z 2) This distinction, as to when the profits taken by the lessor after entry are and when they are not to be in satisfaction of the rent, is not admitted in equity; for the courts of

By section 341, it appeareth, that if the condition be broken for non-payment of the rent, yet if the feoffor bringeth an issue for the rent due at that time, he shall never enter for the condition broken because he affirmeth the rent to have a continuance, and thereby waiveth the condition. And so it is, if the rent had had a clause of distress annexed unto it, if the feoffor had distrained for the rent, for non-payment whereof the condition was broken, he should never enter for the condition broken, but he may receive that rent, and *acquit the same, and yet enter for the condition broken (A 3). But if he accept a rent due at a day after, he shall not enter for the condition broken, because he thereby affirmeth the lease to have a continuance (B 3).

211 b.
10. What shall be a dispensation of a forfeiture.
(Ante, 145 a.)
14 E. 3. Entre Conceable 45.
14 Ass. 11.
42 Ass. 5.
6 H. 7. 3.
17 E. 3. 73.
Pl. Com. 133.
22 H. 6. 57.
(3 Rep. 64. 65.)
1 Rol. Abr. 475. Post, 373 a. Nov 7.)
(103)*

equity will always make the lessor account to the lessee for the profits of the estate during the time of his being in possession of it, and decree him after he is satisfied the rent in arrear, and the costs, charges, and expenses attending his entry and detention of the lands, to give up the possession to the lessee, and deliver and pay him the surplus of the profits of the estate, and the money arising thereby. 6 Bac. Abr. 38 ed. Gwill.

Where a mortgage was made to the use of the mortgagee and his heirs, until he should have received by the rents and profits thereof the money borrowed with interest, and all other sums advanced by him to the mortgagor; and after payment by such rent of the mortgage-money, then to the use of the mortgagor for life, with remainder over; it was held, that the mortgagee was only in the nature of a tenant by *elegit*, and that as soon as his principal with interest was satisfied, either by being paid off, or by perception of the rents and profits, the estate of the mortgagee ceased; and the mortgagor, or his representatives, might have maintained an ejectment. And the court observed, that the mortgagor had a right to come into equity for an account of the profits received, as in an *elegit* the consor has a right to see, if the conusee, on the extended value, has received a satisfaction for his whole debt, and to have the surplus paid to him. *Yates v. Hambly*, 2 Atk. 360. In the above case time was held to be no bar to the redemption, it being analogous to a Welsh mortgage. *Ibid.* 363. Et vid. *Howell v. Price*, Prec. Ch. 423. 1 P. Wms. 291. 2 Vern. 701. *Orde v. Heming*, 1 Vern. 418. What is called a Welsh mortgage, is a perpetual power of redemption, subsisting for ever, and where the mortgagee cannot compel a redemption or a foreclosure, *Longuel v. Scawen*, 1 Ves. 402: but there are circumstances which may create a bar even in mortgages of this description. See *Yates v. Hambly*, supra. *Hartpole v. Walsh*, 4 Bro. P. C. 369.

In a former note on the subject of mortgages, it was mentioned, that a mortgagee in possession is liable to account with the mortgagor for the rents and profits actually received. Ant. p. 37. n. (z). It may be further observed, that where the yearly rents and profits of an estate in mortgage greatly exceed the interest of the money lent, rests are annually made on making up the account, and the surplus applied to sink the principal. *Gould v. Tancred*, 2 Atk. 534. But as this is often attended with great hardships to mortgagees (especially when the sum is large, and the mortgagee forced to enter upon the estate, and then can only satisfy his debt by parcels, and is a bailiff to the mortgagor without salary, subject to an account, (2 Pow. Mort. 1038.)), rests cannot be made unless specially directed by the decree. *Davis v. May*, 2d May, 1815, cited 1 Mad. Rep. 14. *Fowler v. Wightwick*, cited *ibid.* *Webber v. Hunt*, 1 Mad. Rep. 13.—[*Ed.*]

(A 3) That, after acceptance of part of the rent, the lessor may re-enter for the residue, see 10 H. 7. 24 a.—[*Ed.*]

(B 3) See acc. 3 Salk. 3 Cowp. 303. Ante, p. 30. n. (τ). So where, upon an ejectment by a landlord against his tenant, on a proviso for re-entry for non-payment of rent, it appeared, that the lessor had brought covenant for half a year's rent, due on a day subsequent to the day of the demise laid in the declaration in ejectment, and a rule had been obtained to pay the rent arrear into court in that action; it was held, that the plaintiff had waived the right of entry for the forfeiture; because by bringing the action of covenant on the lease, he admitted the defendant to be tenant in possession by virtue of the lease; and the tenant having brought the money into court, was equivalent to acceptance. The law will always incline against forfeitures, as courts of equity relieve against them. *Roe, d. Crompton v. Minshall*. Bull. N. P. 96. Sel. N. P. 677.—[*Ed.*]

LITTLETON.
[Sect. 365.
225 a.]

11. Pleading
conditions in
deed.

In pleading
condition to
defeat an es-
tate of free-
hold, the par-
ty must show
forth the deed
under seal.

*225 b.

*ALSO, a man cannot plead in any action (c 3), that an estate was made in fee, or in fee-tail, or for term of life, upon condition, (146) if he doth not vouch a record of this, or show a writing under seal, proving the same condition. For it is a common learning, that a man by plea shall not defeat any estate of freehold by force of any such condition, unless he sheweth the proof of the condition in writing, &c. unless it be *in some special cases, &c. But of chattels real, as of a lease for years, or of grants of wards made by guardians in chivalry, and such like, &c. a man may plead that such leases or grants were made upon condition, &c. without showing any writing of the condition. So in the same manner a man may do of gifts, and grants of chattels personal, and of contracts personal, &c.*

325 b.

Exceptions to
this rule:

where the
party plead-
ing is a stran-
ger;

23 E. 2.

Gard. 162.

20 H. 3.

Darrein pre-

sent. 12.

35 H. 6. tit. Monstrans des Faits 118.

(d) 20 H. 7. 5. (5 Rep. 75 a.)

(2 Cro. 217.)

(10 Rep. 93, 94.)

35 H. 6. tit. Monstrans des

Faits 11 b. 7 H. 6.

17 H. 5. 5. 3 H. 6. 21.

33 H. 6. 1.

14 H. 8. 8.

“Unless it be in some special cases, &c.” Hereby is implied, that if a guardian in chivalry, in the right of the heir, entereth for a condition broken, he shall plead the state upon condition, without showing of any deed, because his interest is created by the law. And so it is (d) of a tenant by statute merchant or staple, or tenant by *elegit*.

(104)*

Likewise tenant in dower shall plead a condition, &c. without showing of the deed. And the reason of these and *the like cases, is, for that the law doth create these estates, and they come not in by him that entered for the condition broken, so as they might provide for the showing of the deed, but they come to the land by authority of law, and therefore the law will allow them to plead the condition without showing of it.

226 a.

(except
where the
deed belongs
to him.)

(e) 35 H. 6.

ubi supra.

(f) 35 H. 6.

ubi supra.

(e) But the lord by escheat, albeit his estate be created by law, shall not plead a condition to defeat a freehold without showing of it, because the deed doth belong unto him.

A tenant by the curtesy shall not (f) plead a condition made by his wife, and a re-entry for the condition broken without showing the deed; for albeit his estate be created by law, yet the law presumeth that he had the possession of the deeds and evidences belonging to his wife (d 3).

(g) 14 H. 8. 8.

Pl. Com. 149.

(10 Rep. 92,

93.)

(g) But lessees for years, and all others that claim by any conveyance from the party, or justify as servant by commandment, &c. must show the deed.

(146) *que* added in L. and M. and Roh.

(c 3) The general doctrine of pleading will be explained at large in a future chapter. Post, Book III. Chap. 6. Of Pleading.—[*Ed.*]

(d 3) And tenant by the curtesy is entitled to keep the deeds during his life. 10 Co. 94 b. 95 a.—[*Ed.*]

(h) R. brought an *ejectione firmæ* against E. for ejecting him out of the manor of D. which he held for term of years of the demise of C.; E. the defendant pleaded that B. gave the said manor to P. and Katherine his wife in tail, who had issue E. the defendant, and after the donees infeoffed Q. of the manor, upon condition that he should demise the manor for years to R. the plaintiff, the remainder to the husband and to the wife, &c. C. did demise the land to R. the plaintiff for years, but kept the reversion to himself, wherefore Katherine, after the decease of her husband, entered upon the plaintiff, &c. for the condition broken, and died, after whose decease the land descended to E. the issue in tail, &c. now defendant, judgment upon action: exception was taken against this plea, because E. the defendant maintained his entry by force of a condition broken, and showed forth no deed; and the plea was ruled to be good, because the thing was executed, and therefore he need not show forth the deed. *Nota, the defendant being issue in tail was remitted to the estate tail (1).

or where the estate is executed;
(h) 44 E.3. 22.
(6 Rep. 38.)

(Cro. Car. 444.) See after this Chapter, sec. 365. 7 Rep. Ugh red's case.

(105)*.

In a *præcipe quodd reddat* against S., who pleaded that R. was seised, and infeoffed him in mortgage upon condition of payment of certain money at a day, and said that R. paid the money at the day, and entered, judgment of the writ: exception was taken to this plea, for that he showed forth no deed of the condition, and it was ruled, that he need not show forth the deed, for two causes. 1. That he ought not to show any deed to the demandant, because the demandant is a stranger. 2. It might be, when R. paid the money, and the condition performed, that the deed was re-bailed to R. and thereupon the plea was adjudged good, and the writ abated.

11 E. 3. tit. Monstrans des Fails 176.
46 E. 3. 8.

(Cro. Car. 372.)

If land be mortgaged upon condition, and the mortgagee letteth the land for years, reserving a rent, the condition is performed, the mortgagor re-enters; in an action of debt brought for the rent, the lessee shall plead the condition and the re-entry, without showing forth any deed (E 3).

45 E. 3. 8b. Finch.

In an assise the tenant pleads a feoffment of the ancestor of the plaintiff unto him, &c. the plaintiff saith that the feoffment was upon condition, &c. and that the condition was broken, and pleads a re-entry, and that the tenant entered and took away the chest in which the deed was, and yet detaineth the same; the plaintiff shall not in this case be enforced to show the deed (F 3).

or where the showing is hindered by the other party
10 H. 4. 9b.
43 E. 3. 17d.
10 E. 3. 41.
Stimle in Dower.

If a woman give lands to a man and his heirs by deed or without, generally, she may in pleading aver the same to be *causâ matri-*

12 E. 1. Feoffments and Fails 114.

(1) "This is the reason of this case, for now he claims above the condition, and therefore need not show the deed. *Infra*, 227 b."—Lord Nott MSS. [*Butler*. Note 137.]

(E 3) That a man who pleads a deed to which he is neither party nor privy, need not show it, if the estate be executed, see acc. 6 Co. 38 b. 2 Cro. 102. But a party or privy to a deed must show it, though the estate be executed: as the lessor himself cannot plead a condition and entry for the condition broken, without showing the deed, though the condition be executed. *Post*, 227 b. 228 b. 5 Com. Dig. 475. *Pleaser*, (o 11).—[*Ed.*]

(F 3) Acc. 6 Co. 75 a. 3 Lev. 83.—[*Ed.*]

(106)* *monii prælocuti*, albeit she hath nothing in *writing to prove the same, the reason whereof see section 330 (*).

F. N. B. 106 b.
13 R. 2. Mon-
strans des
Faitz 165. 4 E. 4. 35, &c. 11 H. 7. 22 b. 6 H. 7. 8. 9 E. 4. 25, 26. 14 H. 8. 22 b. (Doc.
Play. 51.) (See Flo. 23 a.) (1 Rol. Abr. 413.)

LITTLETON.
[Sect. 366.
226 a.]
In action by
lessee for life
against less-
or, who had
entered for
breach of a
parol condi-
tion, defend-
ant's not
showing deed
aided by ver-
dict;
* 226 b.

[COKE,
227 b.]
10 Ass. p. 9.
21 Ass. 26.
17 Ass. 20.
31 Ass. 21.
33 Ass. 2.
39 E. 3. 29.
44 E. 3. 22.
10 H. 4. 9.
7 H. 5. 5.
9 E. 4. 26.
18 E. 4. 12.
15 E. 4. 16, 17.
11 H. 7. 22.
(Ante 225.
Cro. Jac. 306.)
* 227 a.

[COKE,
227 b.]
Lib. 10. fol. 4.
caso de Sew-
ers.
(107)*

*ALSO, albeit a man cannot in any action plead a condition which toucheth and concerns a freehold, without showing writing of this, as is aforesaid, yet a man may be aided upon such a condition by the verdict of twelve men taken at large, in an assise *of novel disseisin, or in any other action where the justices will take (148) the verdict of twelve jurors at large. As put the case, a man seised of certain land in fee, letteth the same land to another for term of life without deed (c 3), upon condition to render to the lessor a certain rent, and for default of payment a re-entry, &c. by force whereof the lessee is seised as of freehold, and after the rent is behind, by which the lessor entereth into the land, and after the lessee arraign an assise of novel disseisin of the land against the lessor, who pleads that he did no wrong nor disseisin, and upon this the assise is taken; in this case the recognitors of the assise may say and render to the justices their verdict at large upon the whole matter (here it appeareth, that the jurors may find the fact, albeit the deed be not showed in evidence, and the rather for that the condition upon the livery (as hath been said) is good, albeit there be no deed at all), as to say, that the defendant was seised of the land in his demesne as of fee, and so seised, let the same land to the plaintiff for term of his life, rendering to the lessor such a yearly rent, payable at such a feast, &c. upon such condition, that if the rent were behind at any such feast (149) at which *it ought to be paid, then it should be lawful for the lessor to enter, &c. by force of which lease the plaintiff was seised in his demesne as of freehold, and that afterwards the rent was behind at such a feast, (150) &c. by which the lessor entered into the land upon the possession of the lessee, and prayed the discretion of the justices (that is to say, they (having declared the special matter) pray the discretion of the justices; which is as much *to say, as that they would discern what the law adjudgeth thereupon, whether for the demandant, or for the tenant; for, as, by the authority of Littleton, *discretio est discernere per legem, quid sit justum*, that is, to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion: *Si à jure discedas, vagus eris, et erunt omnia omnibus incerta*; and therefore commissions that authorize any to proceed, *secundum sanas discretionem vestras*, is as much to say, as, *secundum legem et consuetudinem Angliæ*, if this be a disseisin done to the plaintiff or not; (151) then, for that it appeareth to the justices, that this was no disseisin to the plaintiff, insomuch as the entry of the lessor was congeable (*) on him; the justices ought to give judg-*

(*) Ante, 204 a. p. 8.

(148) *l-per* in L. and M. and Roh.

(149) *a* not in L. and M. nor Roh.

(150) *an* added L. and M. and Roh.

(151) *Et* added in L. and M. and Roh.

(*) *i. e.* lawful.

(c 3) This must be understood, at common law, before the 29 Car. 2. c. 3.—[Ed.]

ment that the plaintiff shall not take any thing by his writ of assise. And so in such case the lessor shall be aided, and yet no writing was ever made of the condition. For as well as the jurors may have consuance of the (152) lease, they also as well may have consuance of the condition which was declared and rehearsed upon the lease.

"For as well as the jurors may have consuance, &c." Hereby it appeareth, that they that have consuance of any thing, are to have consuance also of all incidents and dependants thereupon, for an incident is a thing necessarily depending upon another. 227 b.

"By which the lessor entered." Here it appeareth, that the condition is executed by re-entry, and yet the lessor after his re-entry shall not, by the opinion of Littleton, plead the condition without showing the deed, because he was party and privy to the condition, for the parties must show forth the deed, unless it be by the act and wrong of his adversary, as hath been said; (i) but an estranger which is not privy to the condition, nor claimeth under the same, as in the cases abovesaid appeareth, shall not, after the condition is executed, in pleading be enforced to show forth the deed; and by this diversity all the books and authorities in law, which seem to be at variance, are reconciled. See also for this matter the section next following. 31 Ass. pl. 21. 10 H. 4. 9.

(i) See more before in this Chapter, sec. 365. (Sic. 369. 6 Rep. 28.)

"IN the same manner it is of a feoffment in fee, or a gift in tail, upon condition, although no writing were ever made of it (153). And as it is said of a verdict at large in an assise, &c. in the same manner it is of a writ of entry founded upon a disseisin; and in all other actions where the justices will take the verdict at large, there (154) where such verdict at large is made, the manner of the whole entry is put in the issue, &c. (108)* LITTLETON. [Sect. 368. 228 a.]

ALSO, in such case where the inquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge; as in the case aforesaid they may well say, that the lessor did not disseise the lessee, if they will, &c. LITTLETON. [Sect. 368. 228 a.]

ALSO in the same case, if the case were such, that after that, the lessor had entered for default of payment, &c. that the lessee had entered upon the lessor, and him disseised, in this case if the lessor arraign an assise against the lessee, the lessee may bar him of the assise; for he may plead against him in bar, how the lessor who is plaintiff made a lease to the defendant for term of his life, saving the reversion to the plaintiff, which is a good plea in bar, inasmuch as he acknowledges the reversion to be to the plaintiff. (155) In this case the plaintiff hath no (156) matter to aid LITTLETON. [Sect. 369. 228 b.] but if lessee re-enters, and in bar to an action by lessor, pleads the lease made by plaintiff, and the reversion in him, lessor is without remedy.

(152) lease, *auxy bien ils poient aver consuance de le*, not in L. and M. nor Roh. nature de matter mys en l'issue, L. and M. and Roh.

(153) &c. L. and M. and Roh.

(154) *par la ou tiel verdict a large fait la*

(155) *Et added in L. and M. and Roh.*

(156) *ascun not in L. and M. nor Roh.*

himself, but the condition made upon the lease, and this he cannot plead, because he hath not any writing of this : and inasmuch as he cannot answer the bar, he shall be barred. And so in this case you may see that a man is (157) disseised, and yet he shall not have assise. And yet if the lessee be plaintiff, and the lessor defendant, he shall bar the lessee by verdict of the assise, &c. But in this case, where the lessee is defendant, if he will not plead the said plead in bar, but plea nul tort, nul diss. then the lessor shall recover by assise, causâ quâ suprà.

- (109)* *Hereby it also appeareth, that albeit the condition was executed by re-entry, yet the lessor cannot plead it without showing of a deed. But of this matter sufficient hath been said before in the two next preceding sections.

228 b.
18 E. 4. 10.
12 Ass. 33.
10 Ass. 16.
26 H. 6. Bar.
9. 38 Ass. 26.
4. 31 Ass. 26.
39 Ass. 3.
43 Ass. 18.
44 Ass. 3.
18 E. 3. Ass.
77. 31 E. 3.
Ibid. 97. 18
Ass. 22.
4 Eliz. Dyer
207. 8 Eliz.
Dyer 246.
*229 a.
(Ante, 201 a.)

"Which is a good plea in bar." In a case where there have been some variety of opinions in our books, Littleton here cleareth the doubt, and that upon a good ground. For he himself reporteth in our books, that it was holden by all the justices of England, that a lease for life, the reversion to the plaintiff, was a good bar in an assise, and also that a lease for years, the reversion to the plaintiff, might be pleaded in an assise : and so of a feoffment in fee with warranty. And herein the diversity of pleading is to be observed; for in the case here put by Littleton of a lease for life, the tenant shall plead it in bar ; but in a case of a lease for *years, or an estate of tenant by statute or *elegit*, the defendant shall not plead in bar, as to say *assisa non*, &c. but justify by force of the lease, &c. and conclude *et issint sans tort*. And if the tenant of the freehold be not named, he shall plead *nul tenant de franktenement nosme en le briefe* : and in the case of the feoffment with warranty, he must rely upon the warranty (H 3).

LITTLETON.
[Sect. 375.
231 a.]
Where the
feoffor may
plead a con-
dition con-
tinued in a
deed poll.
*231 b.

- ALSO, if a feoffment be made by deed poll upon condition (158), and for that the condition is not performed, the feoffor entereth and getteth the possession of the deed poll, if the feoffee brings an action for this entry against the feoffor, it hath been a question if the feoffor may plead the condition by the said deed poll against the feoffee. And some have said *he cannot, inasmuch as it seems unto them that a deed poll, and the property of the same deed belongeth to him to whom the deed is made, and not to him which maketh the deed. And inasmuch as such a deed doth not appertain to the feoffor, it seems unto them that he cannot plead it (159). And others have said the contrary, and have showed divers reasons. One *is, if the case were such, that in an action between them, if the feoffee plead (110)* the same deed, and show (160) it (161) to the court, in this case,

(157) *disseisin-disie*, L. and M. and Roh.
(158) &c. added in L. and M. and Roh.
(159) &c. added in L. and M.

(160) *ceo*, L. and M. and Roh.
(161) *est* not in L. and M. nor Roh.

(H 3) For otherwise, if it be a feoffment of the party himself, or of an ancestor from whom he claims in fee, the plea would be double. Hawk. Abr. 316.—[Ed.]

insomuch as the deed is in court, the feoffor may show to the court how in the deed there are divers conditions to be performed (162) *of the part of the feoffee, &c.* (here is implied if the condition be to be performed on the part of the feoffor or by a stranger), and because they were not performed, he entered, &c. and to this he shall be received. By the same reason when the feoffor hath the deed in hand, and show this to the court, he shall (163) well be received to plead it, &c. and namely, when the feoffor is privy to the fait, for (164) he must be privy to the deed when he makes the deed, &c.

[Coke, 231 b.]

(1 Rep. 26.)

Here the latter opinion is clear law at this day, and is Littleton's own opinion, (k) as before hath been observed.

231 b.

(k) Vid. sect. 170. 202. 240. 24 E. 3. 73. 45 E. 3. Monstrans des Fais 55.

"*Insomuch as the deed is in court, &c.*" And herewith do agree (l) many authorities in law.

(l) 40 Ass. 34. lib. 5. 75 b. Wymark's case.

"*Have showed divers reasons.*"

*Felix qui potuit rerum cognoscere causas.
Et ratio melior semper prævalet.*

The residue of this section needeth no explanation.

ALSO, if two men do a trespass to another, who releases to one of them by his deed all actions personal, and notwithstanding sueth an action of trespass against the other, the defendant may well show that the trespass was done by him, and by another his fellow, and that the plaintiff by (165) his deed (which he sheweth forth) released to his fellow all actions personal, and demands the judgment, &c. and yet such deed belongeth to his fellow, and not to him. But because he may have advantage by the deed, if he will show the deed to the court, he may (166) well plead this, &c. By the same reason (ubi eadem ratio, ibi idem jus) (167) may the feoffor* in the other case when (168) he ought to have advantage by the condition (169) comprised within the deed poll (170).

LITTLETON. [Sect. 376. 232 a.]

[Coke, 232 a.] (111)*

Here by this section it is to be understood, that when divers do a trespass, the same is joint or several at the will of him to whom the wrong is done, yet if he release to one of them, all are discharged, because his own deed shall be taken most strongly against himself; but otherwise it is in case of appeal of death, &c. As if two men be jointly and severally bounden in an obligation, if the obligee release to one of them, both are discharged; and seeing the trespassers are parties and privies in wrong, the one shall not plead a release

232 a.

27 E. 3. 83. 13 E. 4. 2. 15 E. 4. 26. 21 E. 4. 72. 22 E. 4. 7. 8 H. 6. 15. 20 H. 6. 41. 21 H. 6. Arbitrement 41. 2 R. 3. 9 a. 14 H. 8. 10. 34 H. 8. ut.

(162) *de le part de feoffee, &c. et pur ceo que ils ne fueront performs*, not in L. and M. nor Roh.

(166) *pur* added L. and M.(167) *poit le feoffor* not in L. and M. nor Roh.(163) *de ceo* added in L. and M.(168) *le feoffor*, L. and M. and Roh.(164) *il* added in L. and M. and Roh.(169) *compris* not in L. and M. nor Roh.(165) *son-le*, L. and M. and Roh.(170) *&c.* added L. and M. and Roh.

Estrange at
Falt 21. 3 H. 6.
18. 26. (11
Rep. 5. 2 Rol.
Abr. 412. Hob. 66.

to the other without showing of it forth, albeit the deed appertain to the other (1).

(112)*

13 E. 2. ut.
Monstrans
des Faits 42.
(Flo. 439 b.
Dyer 344.
6 Rep. 7.
10 Rep. 93 b.)

*If an action of debt upon an obligation be brought against an heir, he may plead in bar a release made by the obligee to the executors. But, albeit the deed belong to another, yet must he show it forth, for both of them are privy to the testator (1 3).

(1) "26 H. 6 T. Barre 37. Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards; the other obligor pleads this in bar, and it was adjudged a good plea in bar. Nota, each was bound in the entirety, therefore it was joint and several. 34 H. 6. So in the case of the king, if he releases to one of the obligors, the other shall take advantage. 5 Rep. 56. contra. And as a release in deed to one obligor discharges the other, so of a release in law, as 8 Rep. 136. *Needham's case*. A woman obligee marries the obligor, that is another sort of discharge. 264 b. But 17 Car. B. R. two were bound jointly and severally. The plaintiff sued both, and afterwards entered a retraxit against one; whether that discharged the other was the question. Berkley said it was, for it amounts to a release in law, as the plaintiff confesses thereby that he had not cause of action, and therefore he cannot have judgment, as in *Hickmot's case*, 9 Rep. and retraxit is a bar to an action; and the plaintiff by his own act has altered the deed from joint to several, and therefore the other shall have advantage of it. Co. Inst. contra; for a retraxit is only in the nature of an estoppel; and therefore the other shall not have advantage; neither is it a release, though it be in the nature of a release; and if the obligee sues both, and then covenants with one not to sue farther, that is in the nature of a release, but the other shall not take advantage of it; and in 21 H. 6. it is said, that there must be an actual release to one obligor to discharge the other. See March. Rep. 165.—Pas. 18 Car. *Hannan v. Roll*. The obligee releases to one obligor; the other, in consideration of the forbearance, undertakes to pay, and in an action upon the case the matter was found specially; and Rolls argued, that the debt was not absolutely discharged, but only *sub modo*, viz. if the other can have the release to plead, and because the forbearance was a good consideration. But the court was of opinion, that the debt was absolutely discharged, and therefore the consideration was insufficient.—See Hob. Rep. 70. *Parker v. Sir John Lawrence*. In trespass against three, they divided on the pleading. Judgment against one. Then he entered a *noli prosequi* against the two others; it was held to be no discharge to him against whom judgment was had; for as to him, the action was determined by the judgment, and the others are divided from him, and not subject to the damages recovered against him; but a *noli prosequi*, or non-suit before judgment against one, would discharge all."—Lord Nott. MSS. [*Butler*. Note 144.]

[In trover against two, one pleaded not guilty, and a verdict passed against him; the other pleaded a release, and the verdict was for him: on motion for judgment against him, who was found guilty, it was denied, because the trover being joint, a release of all actions discharged both. *Kiffin v. Willis*, 4 Mod. 379. If two are bound in an obligation, and the obligee releases to one of them, proviso that the other shall not take advantage of it; this proviso is void. Lit. Rep. 190. But if A be bound to B. and C. *solvend*. the moiety to B. and the other moiety to C. this is a several obligation, and the release of one shall not prejudice the other. Moor 64. So, where several enter into several covenants in the same deed, a release to one of the covenantors will not discharge the others. Cro. Eliz. 408. 470. 2 Salk. 574.

With respect to a covenant not to sue, it is observable, that the principle upon which a covenant of this kind is held to operate as a release, is to avoid circuitry of action; but it goes no further. Therefore, if two be jointly and severally bound, and the obligee covenants with one of them not to sue him, he may nevertheless sue the other. *Lacy v. Kinsaston*, 12 Mod. 548. 552. S. C. 1 Ld. Raym. 688. *Dean v. Newhall*, 8 T. R. 168. So a covenant not to sue one of two joint debtors, does not operate as a release to the other. *Hulton v. Eyre*, 6 Taunt. 289. And it seems to be now settled, that the rule, that a covenant not to sue operates as a release, applies only to cases where the covenantor and covenantee are single. S. C. 6 Taunt. 296. *Dean v. Newhall*, supra.

See further on the subject of the above annotation, 2 Saund. 48 ed. Wms. Post, Book III. Chap. 6. Of Pleading.]—[Ed.]

(1 3) Formerly, if a man did not show a deed to the court when he ought, the omission

ALSO, if the feoffee granteth the deed to the feoffor, such grant shall be good, and then the deed, and the property thereof, belongeth to the feoffor, &c. And when the feoffor hath the deed in hand, and (172) is pleaded to the court, it shall be rather intended, that he cometh to the deed by lawful means, than by a wrongful mean. And so it seemeth unto them, that the feoffor may well plead such deed poll which compriseth the condition, &c. if he hath the same in hand (173). Ideo semper quære de dubiis, quia per rationes pervenitur ad legitimam rationem, &c.

LITTLETON.
[Sect. 377.
232 a.]

"The property of the deed belongeth to the feoffor." Hereby (113)* it appeareth, that a man may give or grant his deed to another, and such a grant by parol is good. *And it is also implied, that if a man hath an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, viz. the parchment and wax, to another, who may cancel and use the same at his pleasure (κ 3).

(113)*
232 a.
(1 Rep. 1.)
(Ante, 214.)
Post, 260, 280.
2 R. i. Abr.
45, 46, 48.
1 Sid. 212,
213.)
*232 b.

(172) *est-cco*, L. and M. and Roh.

(173) *&c.* added L. and M. and Roh.

was esteemed matter of substance, and not helped upon a general demurrer. 2 Cro. 292. 10 Co. 94. But now it is aided on a general demurrer, Lut. 1355; and the statute 4 & 5 Ann. c. 16. enacts, that no exception shall be taken for not alleging the bringing into court any bond, indenture, or other deed, unless shown for cause of demurrer. And by the 16 & 17 Car. 2. c. 8. after verdict no judgment shall be stayed or reversed for want of alleging the bringing into court of any bond, bill, indenture, or other deed, mentioned in the declaration or other pleading, or letters testamentary, or letters of administration. Com. Dig. 478. (o 17).—[*Ed.*]

(κ 3) By the common law, a *chose in action* (except in the case of the king, 2 Ves. 181.) cannot be assigned or granted over, *Lampert's case*, 10 Co. 48 a; and the reason of the law's not allowing such assignment was, because it tended to champerty and maintenance, and to pass debts into the hands of the more powerful, who were thus enabled to oppress the inferior orders. 1 Mad. Ch. 435. But in equity a chose in action may be assigned, *Squibb v. Wynn*, 1 P. Wms. 381. *Wright v. Wright*, 1 Ves. 411. *Row v. Dawson*, 1 Ves. 333; and according to the case of *Lord Cateret v. Paschall*, even without a consideration. 3 P. Wms. 199. Sed vid. 2 Vern. 595. 3 Ch. Rep. 90. *Anon.* 2 Freem. 145. *Robinson v. Boecassor*, Vin Abr. tit. Assignment, (D) Ca. 29. And an assignment of a chose in action is good against creditors under a bankruptcy, *Brown v. Heathcote*, 1 Atk. 160; and in the assignment no particular words are necessary (1 Ves. 332), though it usually contains an agreement to permit the assignee to make use of the name of the assignor to recover the property, and is considered in the nature of a declaration of trust. 3 P. Wms. 199. And though a chose in action be assigned, in consideration of love and affection, and advancement of children, it is good against the representatives of the assignor. *Wright v. Wright*, 1 Ves. 409. Fearn. Ex. Dev. 524. An assignee of a chose in action, as he is entitled to all the remedies of the seller (*Ex parte Lloyd*, 17 Ves. 245.), so he takes it, subject to the same equity as it was liable to in the assignor's hands (*Coles v. Jones*, 2 Vern. 692. *Turlton v. Benson*, 2 Vern. 764. *Hill v. Caillouel*, 1 Ves. 122. *Davies v. Austen*, 1 Ves. jun. 247.), except in the case of the assignment of bills of exchange, or notes, before they are due, which may be enforced by an assignee for a valuable consideration, though no consideration was given by the person who assigned to him; an exception made in favour of trade. *Anon.* Com. Rep. 49. S. C. 2 Eq. Abr. 85. If a legacy be assigned, the executor, when called upon, cannot set off a debt due to himself from the legatee. *Whitaker v. Rush*, Ambl. 407. And if a bond debt be due to B., and B. assigns, the obligor is bound by having notice of the assignment, and his payment to B. afterwards will not be a discharge as to the assignee. *Langley v. Lord Oxford*, Ambl. 17. *Baldwin v. Billingsley*, 2 Vern. 540. It would, however, be otherwise if there were no notice of the assignment. 1 Ch. Ca. 232. A chose in action, once assigned, cannot, generally speaking, be afterwards assigned, though the assignment be without notice. *Tourville v. Naish*, 3 P. Wms. 307. *Brace v. Duchess of Marlborough*, 2 P. Wms. 496. If, however, the purchaser of an equitable right gives no notice to the trustee of his pur-

Conditions in law.

Littleton, having spoken of conditions in deed, now, according to his own division, cometh to speak of conditions in law.

Definition of a condition in law.

A condition in law, is that which the law intendeth or implieth without express words in the deed.

(114)*
LITTLETON.
[Sect. 378.
233 b.]
The different
kinds of con-
ditions in
law.

**ESTATES which men have upon condition in law, are such estates which have a condition by the law to them annexed, albeit that it be not specified in writing. As if a man grant by his deed to another the office of parkership of a park, to have and occupy the same office for the term of his life, the estate which he hath in the office is upon condition in law, to wit, that the parker shall well and lawfully keep the park, and shall do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him, and to grant it to another if he will, &c. And such condition as is intended by the law to be annexed to any thing is as strong as if the condition were put (174) in writing.*

234 a.
Vid. sect. 419.
229. 230.

And this accords with that ancient rule, *Utique fortior et potentior est dispositio legis quàm hominis.*

LITTLETON.
[Sect. 379.
234 b.]

IN this manner it is of grants of the offices of steward, constable, bedelary, baliwick or other offices, &c. But if such office be granted to a man, to have and to occupy by himself or his deputy, then, if the office be occupied by him or his deputy, as it ought by the law to be occupied, this sufficeth for him, or otherwise (175) the grantor and his heirs may oust (176) the grantee, as is aforesaid.

234 b.
21 E. 4. 20.
Pl. Com. 379.
(Anta. 61 a.)
8 E. 4. 6.
(6 Rep. 59.)

"*Steward.*" Of this I have spoken before.

"*Constable.*" Of this likewise something hath been spoken before.

"*Bedelary.*" *Bedell* is derived from the French word *Beadeau*, which signifies a messenger of the court, or under bailiff, in Latin *Bedellus*.

(115)* And the oath of a bedell of a manor is, that he shall duly and truly execute all such attachments and other process as shall be directed to him from the lord or steward of his court, *and that he shall present all pound breaches which shall happen within his office, and all chattels waved, and estrays.

(174) *ou mustre*, added in L. and M. and Roh.
(175) *le grantor-il*, L. and M. and Roh.

(176) *le grantee*, not in L. and M. nor Roh.

chase, and such equitable right is afterwards assigned to a second purchaser, who gives notice of his assignment, he, it has been thought, would be preferred. 1 Mad. Ch. 434. Sug. Vend. & Purch. 600, last edit. 1 Ves. 367. 9 Ves. 411.—[Ed.]

"Bailiwick." Of this sufficient hath been said before.

As to conditions in law, you shall understand they be of two natures, that is to say, by the common law, and by statute. And those by the common law are of two natures, that is to say, the one is founded upon skill and confidence, the other without skill or confidence : upon skill and confidence, as here the office of parkership, and other offices in sect. 379 mentioned, and the like. 233 b.
Pl. Com. 373 a.
(Sir Henrie
Nevill's case,
21 E. 4. 20. 82.
(1 Rep. 14 b.)

Touching conditions in law without skill, &c. some be by the common law, and some by the statute. By the common law, as to every estate of tenant by the curtesy, tenant in tail after possibility of issue extinct, tenant in dower, tenant for life, tenant for years, tenant by statute merchant or staple, tenant by elegit, guardian, &c. there is a condition in law secretly annexed to their estates, that if they alien in fee (L 3), &c. that he in the reversion or remainder may enter, *et sic de similibus*, or if they claim a greater estate in court of record, and the like. Lib. 8. fol. 44.
Witting-
ham's case.

Concerning conditions in law founded upon statutes, for some of them an entry is given, and for some other a recovery by action : where an entry is given, as upon an alienation in mortmain, &c. and the like ; where an action is given, as for waste against tenant for life and years, and the like.

Here it is worthy the observation to take a view of the divisions aforesaid in some particular case. As for example, admit that an office of parkership be granted or descend to an infant or feme covert, if the conditions in law annexed to this office which require skill and confidence be not observed and fulfilled, the office is lost for ever, because, as Littleton saith here, it is as strong as an express condition. But if a lease for life be made to a feme covert, or an infant, and they by charter of feoffment alien in fee, the breach of this condition in law, that is without skill, &c. is no absolute forfeiture of their estate. So of a condition in law given by statute, which giveth an entry only. As if an infant, or feme covert with her husband, aliens by charter of feoffment in mortmain, this is no bar to the infant, or feme covert. But if a recovery be had against an infant or feme covert in an action of waste, there they are bound and barred for ever. (116)
Diversity be-
tween a con-
dition in law
founded on
skill, and
other condi-
tions in law.
(Cro. Car.
279. Lib. 8.
fol. 44. Wit-
tingham's
case. (Mo.
92. 1 Cro. 7.
9 Rep. 72.
Pl. 205. Post,
100.)

(L 3) That is, either by act *in pais*, as by feoffment, or by matter of record, as by fine or common recovery, whereby the reversion or remainder is divested. Post, 251 b. But an alienation by a particular tenant is no forfeiture, if the reversion or remainder is not thereby divested : and therefore if tenant for life or years of an advowson, rent, common, or other thing, which lies in grant, by deed grants his estate to another in fee, it is no forfeiture. Post, 251 b. So it is no forfeiture, if tenant for life conveys by bargain and sale, or by lease and release, to another in fee. 2 Leon. 60. 3 Mod. 151. So, if tenant for life or years joins with him in reversion or remainder in fee, in a feoffment, or fine, or recovery, it is no forfeiture ; for each gives that which he lawfully may. 6 Co. 15 a. But if a particular tenant claims the fee, it will be a forfeiture : as, if he joins the *mise*, in a writ of right against him, upon the mere right ; for tenant in fee only can do it. Post, 251 b. 1 Co. 16 a. So if he affirms the fee to be in a stranger : as if he prays in aid of a stranger, post, 259 a. ; or accepts from a stranger a fine *sur consauance de droit come ceo*, &c. for thereby he affirms upon record the reversion to be in a stranger, though the reversion is not thereby divested. Post 252 a. 9 Co. 106 b. 1 Mod. 117. 4 Com. Dig. 227. (A 5).—[Ed.]

Condition in law by statute giving a recovery, stronger than other conditions in law.

And it is to be observed, that a condition in law by force of a statute which giveth a recovery, is in some cases more strong than a condition in law without a recovery. For if lessee for life make a lease for years, and after enter into the land, and make waste, and the lessor recover in an action of waste, he shall avoid the lease made before the waste done. But if the lessee for life make a lease for years, and after enter upon him, and make a feoffment in fee, this forfeiture shall not avoid the lease for years. Nor in any of the said cases a precedent rent granted out of the land shall be avoided. For if lessee for life grant a rent charge, and after doth waste, and the lessor recovereth in an action of waste, he shall hold the land charged *during the life of the tenant for life, but if the rent were granted after the waste done, the lessor shall avoid it.

(Ante, 185 a.)

*234 a.

And the reason wherefore the lease for years in the case aforesaid shall be avoided, is, because of necessity the action of waste must be brought against the lessee for life, which in that case must bind the lessee for years, or else by the act of the lessee for life the lessor should be barred to recover *locum vastatum*, which the statute giveth (1).

(117)*

(Post, 238 b.)
On breach of a condition in law, precedent charges not avoided.

*If a man hath an office for life which requireth skill and confidence, to which office he hath a house belonging, and chargeth the house with a rent during his life, and after commit a forfeiture of his office, the rent-charge shall not be avoided during his life, for regularly a man that taketh advantage of a condition in law, shall take the land with such charge as he finds it. And therefore Littleton is here to be understood, that a condition in law is as strong as a condition in deed, as to avoid the estate or interest itself, but not to avoid precedent charges, but in some particular cases, as by that which hath been said appeareth.

LITTLETON.
[Sect. 383.
285 b.]

Devise of lands to an executor to be sold, a condition in law.

[COKE,
235 b.]

ALSO, a man may see in the Book of Assises, anno 38 E. 3. p. 3. (178), (the Book of Assises is a Book of the Reports of Cases in the reign of king Edward the Third, and it is called the Book of Assises, because the greatest part of the cases therein are upon writs of assise brought, as hath been said, and which hath been cited before), a plea of assise in this form following, scilicet, *An assise of novel disseisin was some time brought against A., who pleaded to the assise, and it was found by verdict, that the ancestor of the plaintiff devised his lands to be sold by the defendant, who was his executor, and to make distribution of the money for his soul: and it was found, that presently after the death of the testator, one tendered to him a certain sum of money for the lands, but not to the value, and that the executor afterwards held the*

(178) p. 3. not in L. and M. nor Rob.

(1) "For the recovery relates to the time of the waste done, which is paramount to the grant, but it does not relate to the time of making the estate, to avoid charges by force of this condition in law, unless in the case of a lease for years, which is of necessity to have the place wasted."—Lord Nott. MSS. *Butler*. Note, 148.

lands in his own hands two years, to the intent to sell the same dearer to some other; and it was found that he had all the time taken the profits of the lands to his own use, without doing any thing for the soul of the deceased, &c. *Mowbray*, (179) justice, [COKE, 236 a.] (John Mowbray was a reverend judge of the court of common pleas, and descended of a noble family), said, the executor in this case is bound by the law to make the sale as soon as he may after the death of his testator, and it is found that he refused to make sale, and so there was a default in him, and so by force of the devise he was bound to put all the profits (180) coming of the lands to the use of the *dead, and it is found that he took them to his *own use, and so another default in him. Wherefore it was adjudged that the plaintiff should recover (181). And so it appeareth by the said judgment, (this conclusion upon a judgment is of great authority in law, *quia judicium pro veritate accipitur*, [COKE, 236 b.] and, as it hath been said, *judicium is quasi juris dictum*), that by force of the said devise the executor had no estate nor power in the lands, but upon condition in law.

“Devised his lands to be sold by his executors.” This must be intended to be of lands devisable by custom, for lands by the common law were not devisable (as hath been said): for in this section is implied a diversity, viz. when a man deviseth that his executor shall sell the land, there the lands descend in the mean time to the heir, and, until the sale be made, the heir may enter and take the profits. But when the land is devised to his executor to be sold, there the devise taketh away the descent, and vesteth the state of the land in the executor, and he may enter and take the profits, and make sale according to the devise. And here it appeareth by our author, that when a man deviseth his tenements to be sold by his executors, it is all one as if he had devised his tenements to his executors to be sold: and the reason is, because he deviseth the tenements whereby he breaks the descent (1) (M 3). 236 a. (Litch. 9. Ante, 113 a. 181.)

(179) *justice disoit*, not in L. and M. nor Roh. (180) *avenants-prevenantes*, in L. and M. and Roh. (181) &c. added in L. and M. and Roh.

(1) “1 Co. 25 b. *Porter's case*. Breach of condition assigned, because he has not performed within convenient time, viz. eight years.—Ant. 113. cont. that where lands are devised to executors to sell, and one refuses, yet it is within 21 H. 8. though it be an interest, and though the words of the statute are, where lands are willed to be sold by executors, which gives only a power; so there was a difference between them.—49 E. 3. 17. The case was, a woman seised of lands in London devised them to be sold by her executors, and died without an heir; that devise prevented the escheat which the king pretended to have, and the executors could enter and sell, therefore more than a bare authority passed. Yet in 1651, on evidence at the bar, between *Wilkinson* and *White*, this case was started; and Lord Chief Justice Rolls doubted of this opinion, because, he said, it was only a descent, according to the words of Littleton; and that it appeared to him, that when lands are devised to be sold by executors, there no interest passes, as in the last clause here.”—Lord Nott. MSS. *Butler*. Note, 150.

[In the case above cited by Lord Nottingham from the Year Books, it appears, that no judgment was given; and Mr. Sugden observes, that it is quite clear, that at this day the devise in that case would be held to give a power only. Sugd. Pow. 106. See n. (M 3) infra.]—[Ed.]

(M 3) See ante, 113 a. vol. 1. p. 399, n. 18. where Mr. Hargrave inclines to construe a

(119)* *"The executor in this case is bound by the law to make the sale as soon as he may after the death of his testator, &c."* And

(4 Rep. 51 b.)

(3 Cro. 19.
21 a.)

*236 b.

Mich. 31 &
32 Eliz. In
the King's
Bench:
Crickmer's
case adjudg-
ed. Dy. 6 E.
6. fol. 74.
7 E. 6. 70.
(1 Leo. 174.)
19 Rep. 41.
Cro. Car. 165.

the reason hereof is, for that the mean profits taken before the sale shall not be assets, so as he may be compellable to pay debts with the same, and therefore the law will enforce him to sell the lands as soon as he can, for otherwise he shall take advantage of his own laches. But if a man devise that his executor shall sell his land, there he may sell it at any time, for that he hath but a bare power, and no profit. And by this case it appeareth what construction the law maketh for the speedy payment of debts. And here is to be observed, that many *words in a will do make a condition in law, that make no condition in a deed; as here to devise lands to an executor *ad vendendum*, so if lands be devised to one *ad solvendum* £20 to I. S., or paying £20 to I. N. this amounts to a condition. And Crickmer's case was this: A man seised of certain lands holden in socage had issue two daughters, A. and B., and devised all his lands to A. and her heirs, to pay unto B. a certain sum of money at a certain day and place; the money was not paid; and it was adjudged, that these words "to pay," &c. did amount in a will to a condition; and the reason was, for that the land was devised to A. for that purpose, otherwise B., to whom the money was appointed to be paid, should be remediless, *et interest republicæ suprema hominum testamenta rata haberi*: and the lessee of B., upon an actual ejectment, recovered the moiety of the land against A.

(120)*
LITTLETON.
[Sect. 380.
234 b.]
Limitations.
Effect of the
words,
Durante,

**ALSO, estates of lands or tenements may be made upon condition in law, albeit upon the estate made there was not any mention or rehearsal made of this condition. As put the case, that a lease be made to the husband and wife, to have and to hold to them during the coverture between them; in this case they have an estate for term of their two lives, upon condition in law, scil. if one of them die, or that there be a divorce between them, then it shall be lawful for the lessor and his heirs to enter, &c.* (N 3).

devise that *executors shall sell the land*, as well as a devise of *lands to be sold by executors*, as investing them with the fee-simple, and not merely a power. The law, however, as to this point, seems to be still unsettled. Mr. Sugden, after reviewing the authorities, concludes, that a devise that *the executors shall sell the land*, or that *land shall be sold by the executors*, will give them simply an authority. And he further observes, that there seems great reason to contend, that even a *devise of land to be sold by his executors*, without words giving the estate to them, must be deemed to invest them with a power only, and not to give them an interest. Sugd. Pow. 102—108. It is observable, that where a power of sale is given to executors, they may exercise it, although they renounce probate of the will. Sugd. Pow. 165. Append. No. 1. *Keates v. Burton*, 14 Ves. 434. And if any of them refuse the trust, the others may sell. Sugd. Pow. 156. Where a testator directs his estate to be sold, without declaring by whom the sale shall be made, if the fund be distributable by the executor, either for the payment of debts or legacies, he will take a power of sale by implication. Sugd. Pow. 160. And it seems that whilst the chain remains unbroken, the power until exercised will go from him to his executors. *Idem* 165. Where a power of sale given to several, shall survive, see Sugd. Pow. 156, ante, 113 a. vol. 1. p. 399. and the notes there; and that equity, by reason of the trust, will interpose to prevent the consequences arising from the extinction of the power, see Sugd. Pow. 386, 7.—[Ed.]

(N 3) For the distinction between a condition in deed and a limitation, here denominated by Littleton a condition in Law, see a. (L 2), ant. p. 87. 2 Bl. Com. 155. Fearn. Cont. Rem. 101. 400.—[Ed.]

"If one of them die, &c." For, if any of them die, the coverture is dissolved, and consequently the state determined by the limitation.

235 a.

"Or that there be a divorce between them, &c." The divorce that Littleton here speaketh of is intended of such divorces (*) as dissolve the marriage *à vinculo matrimonii*, and maketh the issue bastard, because they were not *justæ nuptæ*. And therefore in Littleton's case, though the husband and wife be divorced *causâ adulterii*, yet the freehold continueth, because the coverture continueth.

(*) Vid. sect. 399. (Sid. 13. 118. 5 Rep. 98. 7 Rep. 42. Cro. Car. 463. 2 Inst. 622. Vaugh. 221. 319. 321.) 32 H. 8. c. 31.

AND that they have an estate for term of their two lives is proved thus: Every man that hath an estate of freehold in any lands or tenements, either he hath an estate in fee, or in fee-tail, or for term of his own life, or for term of another man's life, and by such a lease, they have a freehold, but they have not by this grant fee, nor fee-tail, nor for term of another's life, ergo, they have an estate for term of their own lives, but this is upon condition in law in form aforesaid; and in this case if they shall do waste, the feoffor shall *have a writ of waste against them, supposing by his writ, *quòd tenet ad terminum vitæ*, &c. (183), but in his count he shall declare how and in what manner the lease was made.

LITTLETON. [Sect. 381. 235 a.]

*235 b.

"Supposing by his writ, *quòd tenet ad terminum vitæ*." This and the rest of this section is evident and plain.

235 b. 37 H. 6. 27.

*IN the same manner it is, if an abbot make a lease to a man to have and to hold to him during the time that the lessor is abbot; in this case the lessee hath an estate for term of his own life: but this is upon condition in law, scil. that if the abbot resign, or be deposed, that then it shall be lawful for his successor to enter, &c.

(121)* LITTLETON. [Sect. 382. 235 b.]

So it is of a bishop, archdeacon, and other ecclesiastical or temporal body politic or corporate, or of any officer or graduate, or the like.

235 b. Vid. Bract. lib. 5. 414. (Flo. 242.)

And so it is of a translation and cession.

Here Littleton termeth words of limitation to be conditions in law: for his example is,

234 b. (1 Rol. Abr. 411. Ante, 214 b. Post. 342.)

"During the coverture between them." *Durante co-operturâ inter eos*. This word (*durante*) is properly a word of limitation, as *durante viduitate*, or *durante virginitate*, or *durante vitâ*, &c. And properly a condition in law is, as hath been said, where the law createth the same without any express words.

Dum,
27 H. 6. 27.
3 E. 3. 15.
3 Ass. pl.
Dummodo,
*235 a.
(Ante 214b.
4 Rep. 3 a.
14 E. 2.
Grant 92.
Quamdiu, &c.
(10 Rep. 42. Flo. 242 a. Vaughan 32. 4 Rep. 33.) 37 H. 6. 27. 9 Rep. 35.)

Dum also maketh a limitation; as if a lease be made, *dum sola fuerit*, or *dum sola et casta vixeret*. *Dummodo* is also a word of limitation; as *dummodo* **solvet talem redditum*. *Quamdiu* also is a word of limitation, for if a man grant a rent out of the manor of D. *quamdiu* the grantor shall be dwelling upon the manor, this is good, or *quamdiu se bene gesserit*.

10 Ass. 4.
6 E. 3. 8. 9. 21.
3 E. 3. 18.
Annuite 40.
19 H. 6. 54.
25, 26.

And so be these words, *donec*, *quousque*, *usque ad*, *tamdiu*, *ubicunque*.

Tempo. E. 1. Annuite 180. 11 Ass. p. 8. 21 Ass. p. 18. 26 E. 3. 69. 7 E. 4. 16. 9 E. 4.

LITTLETON.
[Sect. 384.
236 b.]
Limitations
may be plead-
ed without
deed.

(184) *AND many other things there are of estates upon condition in law, and in such cases he needeth not to have showed any deed, rehearsing the condition, for that the law itself purporteth the condition, &c.*

Ex paucis dictis intendere plurima possis.

(129)* *More shall be said of conditions in the (185) next chapter, in the Chapter of Releases, and in the Chapter of Discontinuance.

237 a. "Ex paucis dictis intendere plurima possis."

Verses at the first were invented for the help of memory, and it standeth well with the gravity of our lawyer to cite them. By this verse of our author, inferences and conclusions in like cases are warrantable.

236 b.
9 E. 4. 26.
(6 Rep. 74.
6 Rep. 33.)

(Ante, 214b.)

Hereby it appeareth, that limitations (which, as hath been said, Littleton termeth conditions in law) may be pleaded without deed: and the reason of our author is observable, because the law in itself purporteth the condition, whereof somewhat hath been said before, and therefore look back to the conditions in law, or words of limitation, and withal that a stranger may take advantage of a limitation, as hath been said.

Vid. sect. 230.

Littleton, having spoken at large of conditions in deed and in law, somewhat seemeth necessary to be said of defeasances, whereby the state or right of freehold and inheritance may be defeated and avoided.

Defeasance.
Estate execu-
cuted, not de-
feasible by a
subsequent

"Defeasance," *Defeisantia*, is fetched from the French word *defaire*, i. e. to defeat or undo, *infectum reddere quod factum est* (o 3). There is a diversity between inheritances executed, and in-

(184) *Et mults autres choses et cases y sont* (185) *prochein chapitre-chapitre de discentz d'estates sur condition en la ley*, not in L. and *que tollent entres*, L. and M. and Roh. M. nor Roh.

(o 3) A defeasance is an instrument which defeats the force or operation of some other deed or estate; and that which in the same deed is called a condition, in another deed is

heritances executory; as lands executed by livery, &c. cannot by indenture of defeasance be defeated afterwards. And so, if a disseisee release (A) a disseisor, it cannot be defeated by indentures of defeasance made afterwards; but at the time of the release or feoffment, &c. the same may be defeated by indentures of defeasance, for it is a maxim in law, *Quæ incontinenti fiunt in essi videntur*. (1) (P 3).

44. 30 Ass. p. 1. 30 Ass. p. 11. 31 Ass. 32. (Ante, 207 a. 1 Bol. Abr. 591.)

But rents, annuities, conditions, warranties, and such like, that be inheritances executory, may be defeated by defeasances made, either at that time, or any time after: and so the law is of statutes, recognizances, obligations, and other things executory.

Lastly, somewhat were necessary to be spoken concerning clauses of provisoes, containing power of revocation, which since Littleton wrote are crept into voluntary conveyances, which pass by raising of uses, being executed by the (*) statute of 27 H. 8. and are become very frequent, and the inheritance of many depend thereupon. As if a man seised of lands in fee, and having issue divers sons, by deed indented, covenanteth in consideration of fatherly love, and for the advancement of the blood, or upon any other good consideration, to stand seised of three acres of land to the use of himself for life, and after to the use of Thomas his eldest son in tail; and for default of such issue, to the use of his second son in tail, with divers like remainders over; with a proviso that it shall be lawful for the covenantor at any time during his life to revoke any of the said uses, &c. this proviso being coupled with an use, is allowed to be

a defeasance. As if a man by deed covenants or grants, that, upon payment of a less sum on a particular day, an obligation, recognizance, &c. shall be void. Cro. Eliz. 623. 3 Com. Dig. 354. Every defeasance must contain proper words, as *that the thing shall be void*, *Lacy v. Kynaston*, 2 Salk. 575. *Trevett v. Aggas*, Willes, 107; but a letter of license, that the obligor shall not be sued amounts to a defeasance. *Aylaffe v. Scrimshire*, Carth. 64. And the defeasance must be by matter as high as the thing to be defeated: therefore if an obligation be to pay at such a day, an agreement *per scriptum manus sua signatum*, to give time to a future day, is not sufficient; for it ought to be by deed. *Blemerhasset v. Pierson*, 3 Lev. 234. *Hayford v. Andrews*, Cro. Eliz. 697. S. P. Cowp. 47. *Cabell v. Waughan*, 1 Saund. 291. n. (1). So where, in covenant for non-payment of money, the defendant pleaded a discharge in nature of a release *without deed*, the plea on demurrer was adjudged to be ill. *Rogers v. Payne*, 2 Wils. 376. And where a lease contained a proviso that the lessee should not let without leave *in writing*, on pain of forfeiture, a *parol* license was held not to discharge the lessee from the proviso. *Roe v. Hurston*, 2 T. R. 415. S. P. *Mease v. Mease*, Cowp. 47. *Little v. Holland*, 3 T. R. 590. *Brown v. Goodman*, 3 T. R. 593 n.—[Ed.]

(A) The word to seems to be here requisite.

(1) A power of revocation may be defeated by a defeasance made at the same time, or at any time after. 1 Rep. 113.—See Carth. 64. But if a thing executory on its commencement be after executed, it cannot be defeated by a subsequent defeasance. 5 Rep. 90 b. In the case of *Cotterell v. Purchase*, Lord Talbot said he should always discourage the practice of drawing an absolute deed, and making a defeasance, as it wore the face of fraud. Ca. Temp. Talbot, 61—64. *Butler*. Note 151.

(P 3) In case of a feoffment, &c. where the estate is executed, it is not to be defeated by condition or defeasance, unless contained in the same deed, or in another executed at the same time. 2 Saund. 48. But the law is clear that a bond, judgment, or statute, may be defeated by a subsequent defeasance. Cro. Eliz. 623. 755.—[Ed.]

(193)*
deed of defeasance, Bract.
lib. 2. fol. 16.
17 Ass. p. 2.
5 E. 3. 42 R.
3. 1. 43 E. 17.
43 Ass. 12.
7 H. 6. 43.
8 H. 6. 52.
32 E. 3.
Annu. 20.
5 E. 3. Annu.
1 Bol. Abr. 591.)

237 a.
Secus as to things executory.
20 Ass. pl. 7.
7 E. 4. 29.
Browning and Beston's case.
Pl.
Com. 131.
26 H. 8. Dyer
6. 37 H. 6. 15.
19 R. 2. Done
10. Albanie's case, lib. 1.
107.

Powers of revocation.
(8 Rep. 22.
3 Rep.
Twyne's case.)
(*) 27 H. 8.
cap. 10. (Cro.
Car. 472.
H. b. 348.
9 Rep. 107.
1 Rep. 173.
175.)

(124)* good, and not repugnant to the former states. But in case of a feoffment, or other conveyance, whereby the feoffee or grantee, &c. is in "by the common law, such a proviso were merely repugnant and void.

On revocation of uses, covenantor seised in fee without entry or claim.

And first, in the case aforesaid, if the covenantor, who had an estate for life, do revoke the uses according to his power, he is seised again in fee-simple without entry or claim.

May revoke part of the uses at one time, and part at another.

Secondly, he may revoke part at one time, and part at another.

On alienation of part, the power extinct for part only: on alienation of the whole, all the power extinct.

Thirdly, if he make a feoffment in fee, or levy a fine, &c. of any part, this doth extinguish his power but for that part; whereas in that case the whole condition is extinct. But if it be made of the whole, all the power is extinguished; so as to some purposes it is of the nature of a condition, and to other purposes in nature of a limitation.

Lib. 1. fol. 173.

174. Digge's case, lib. 1. fol. 107. Albanie's case, lib. 10. fol. 143. Scrope's case, lib. 7. fol. 12, 13. Sir Francis Englefield's case. (2 Bol. Abr. 263. 1 Bol. Abr. 331.)

Secus in the case of a power without interest.

Fourthly, if he that hath such power of revocation hath no present interest in the land, nor by the ceasor of the estate shall have nothing, then his feoffment or fine, &c. of the land is no extinguishment of his power, because it is mere collateral to the land.

New uses may be limited by the same conveyance revoking the old.

Fifthly, by the same conveyances that the old uses be revoked, may new be created or limited, where the former cease *ipso facto* by the revocation, without either entry or claim.

Powers of revocation to be construed favourably.

Sixthly, that these revocations are favourably interpreted, because many men's inheritances depend on the same (1) (q 3). And here I may apply the above said verse :

Ex paucis dictis intendere plurima possis.

(1) Some observations will be made in the notes to the Chapter of Releases, on Powers of Revocation, and other powers deriving their effect from the statute of uses.—A reference was in note 1, 216. a. to this place, for some observations on the doctrines of *conditions precedent*, and *condition subsequent*. In Eq. Ca. Ab. 108. it is observed, "that conditions precedent are such as are annexed to estates, and must, at law, be punctually performed, before the estate can vest. A condition subsequent is, when the estate is executed; but the continuance of such estate dependeth on the breach or performance of the condition. Though this distinction is often mentioned in courts of equity, yet the prevailing practice there is to relieve against conditions, where compensation can be made, whether they be precedent or subsequent." This observation is illustrated and confirmed by the cases collected under the title of Conditions precedent and subsequent, in Mr. Vince's Abridgment;—and see Frances's Maxims of Equity, p. 44. and Kaim's Princ. of Eq. 61. 81. Ed. 1760.—One of the most material points of discussion respecting the operations at law and in equity of conditions precedent and conditions subsequent, arises from those cases where *conditions are annexed to devises, making them void on the marriage of the devisee without consent*. These cases have been frequently discussed in our courts. All the learning upon them is to be found in the case of *Harvey v. Aston*, Com. Rep. 796. 1 Atk. 361. *Reynish v. Martin*, 3 Atk. 330. and *Scott v. Tyler*, 2 Bro. Ch. Ca. 468.

The doctrine of conditions precedent and subsequent, also frequently applies to the vesting of portions and legacies made payable at a future time. There are few points of learning upon which the cases in the books are more numerous, or seemingly more discord-

ant. Perhaps the following distinction may serve to enable the reader to reconcile them. It was laid down in the case of *Pawlet v. Pawlet*, 2 Ventr. 366, 367. that where a legacy is charged upon real estate, if the person entitled to it dies before the day of payment, it sinks into the land for the benefit of the owner of the inheritance. In *Hall v. Terry*, 1 Atk. 502. and *Pan v. Clark*, 1 Atk. 510. Lord Hardwicke seems to have thought himself bound by this rule, and decreed those cases accordingly. But in *Lowther v. Condon*, 2 Atk. 130. *Sherman v. Collins*, 3 Atk. 319. *Hodgson v. Rawson*, 1 Ver. 44. his Lordship departed from this rule; and perhaps the general rule, as it now stands, is, that when a legacy is given, charged upon a real estate, and payable at a future time, and there are no express words in the will to make it immediately a vested interest; there, if a stronger implication to the contrary does not arise from the other part of the will, the court, from its inclination to favour the heir, considers its being so charged, and so payable, as circumstances amounting to an implication that the testator's intention was, that it should not vest till the time in which it is made payable. Most clearly it is in the testator's power to make it immediately vested and transmissible, though charged upon real estate, and payable at a future time, by using express words to indicate his intention that it should be so;—and if this can be done by express words, there cannot, it should seem, be any reason why it may not be done by implication. Therefore if there are any circumstances or expressions in a will, from which the implication, that it was the testator's intention to make it immediately a vested legacy is stronger than the implication to the contrary, which arises from its being charged upon a real fund, and payable at a future day, it is to be considered as a vested and transmissible interest notwithstanding those circumstances. One of the circumstances, which the courts have considered as affording very strong grounds to imply the testator's intention to be, that the legacy should be immediately vested and transmissible, though the payment is postponed to a future time, is where the payment is postponed for reasons that are not personal to the legatee; but arise or seem to be calculated with a view to the circumstances of the fund.—Upon this ground Lord Hardwicke seems, in a great measure, to have decided in the cases cited above of *Lowther v. Condon*, *Sherman v. Collins*, and *Hodgson v. Rawson*. See also *King v. Withers*, Ca. Temp. Talbot, 117. *Butler v. Duncomb*, 1 P. Wms. 457. *Piffeld's case*, 2 P. Wms. 513. *Hutchins v. Foy and Gover*, Com. 716. *Godwin v. Munday*, 1 Bro. Cha. Rep. 191.

II. Where the legacy is charged upon *personality* only; there, if the legatee dies before the day of payment, his personal representatives become entitled to the legacy; unless it is to be collected from the testator's will, that he intended the contrary.—In the construction of bequests of this nature, there is an established distinction of a gift of a legacy to a man, at, or if, or when, he attains 21.—In the first case, the attaining 21 is held to be individually applicable as much to the substance as to the payment of the legacy, and therefore the legacy is held to lapse by the death of the legatee before the time. In the second case the attaining 21 is held to refer, not to the substance, but to the payment, only of the legacy, and therefore here the legacy is held not to lapse by the death of the legatee before the time.—It has been held to be an exception to this distinction, where the testator has disposed of the intermediate interest either to a stranger or to the legatee. And the distinction does not hold where the legacy is a charge upon real estate.

III. With respect to legacies charged on a *mixed fund*, consisting both of real and personal estate;—if the legatee dies before the time of payment, it seems to be settled, that the legacy should sink in the land, in all cases of this nature where it would be held to sink in the land if the fund consisted of real estate only: but this is only so far as it is necessary to resort to the real estate; for in these cases the legacy is still vested as to the personal estate, in all cases where it would be vested if the fund consisted of personal estate only. See *Sherman v. Collins*, 1 Atk. 320. *Hodgson v. Rawson*, 1 Ves. 48. *Duke of Chandos v. Talbot*, 2 P. Wms. 612. and Mr. Cox's excellent note on the last case. Since the publication of the thirteenth edition of these annotations, the doctrine of conditions, as applicable to legacies, has been fully and ably explained by Mr. Roper, in his Treatise on the Law of Legacies, in two volumes octavo.—A succinct of it has been attempted in the 6th edition of Mr. Fearn's Essay on Contingent Remainders, p. 552. Note 1.

For the difference between the common law of conditions, and that of the civil law and common law, see the second part of Fulbeck's Parallel, 7th Dialogue.

In the former part of these notes, some observations were made on the leading points of the doctrine of mortgages. The reader will find every thing relating to that comprehensive subject, collected with great industry and ingenuity, in *The Law of Mortgages*, by Mr. Powell.—[*Butler*. Note 152.]

(q 3) Powers of revocation, in their creation, are to be construed favourably, and therefore no express or technical words are necessary to the creating of such powers; but any

CHAPTER XXVIII.

OF ESTATES IN REMAINDER AND REVERSION. (A)

(126)*

49 a.

Definition of
a remainder.
(Plow. 25 a.
Post, 143 a.
Vaugh. 269.)

* A REMAINDER is a residue of an estate in land, depending upon a particular estate, and created together with the same, and in law Latin it is called *remanere* (1).

(1) "Sect. 215." Hal. MSS.—[Hargr. n. 9. 49 a.]

expression which denotes an intent to reserve such power will be sufficient. *Bishop of Oxford v. Leighton*, 2 Vern. 376. *Lavender v. Blackstone*, 3 Keb. 26. But if such power be once executed, that is, the old uses over the whole estate revoked, and new uses limited, such new uses cannot be revoked without an express reservation of a power for such purpose. *Hele v. Bond*, Prec. Ch. 474. *Zouch v. Woolston*, 2 Burr. 1136. 2 Ves. 211. A power of revocation may extend to all the limitations, or be restricted to a particular estate limited by the conveyance; as where the use is to A. for life, remainder over, with a power to revoke the estate for life only, this seems, says Rolle, to be a good power. *Thompson v. Freston*, 2 Rol. Abr. 262. A power of revocation may be either a power relating to the land, that is, a power limited to one that had, has, or shall have an estate or interest in the land, which power is either appendant or in gross: or simply collateral; as where the party to whom the power is reserved has not, nor ever had any estate in the land. *Edwards v. Slater*, Hard. 415. Gilb. on Uses, 141. 143. *Sanders on Uses*, 289. 2 Fcnbl. Tr. Eq. 155. With respect to the reservation of powers of revocation, Mr. Sugden, in his valuable Treatise of Powers, states the result of the authorities to be, "1st, That in a deed executing a power, a power of revocation and new appointment may be reserved, although not expressly authorized by the deed creating the power. *Adams v. Adams*, Cowp. 651. Vid. *Digge's case*, 1 Co. 173 b. And that such powers may be reserved *toties quoties*. *Becket's case*, Lane, 118. *Hele v. Bond*, supra. *Digge's case*, supra. 2d, That where an appointment under a power is made by deed, it cannot be revoked unless an express power be reserved in the deed by which the power is executed: a revocation will not be authorized by a general prospective power in the deed creating the first power. *Hele v. Bond*, supra. 3d, That although in the original settlement a power of revocation only be reserved, yet a power to limit new uses is implied, and may be executed accordingly (*Fowler v. North*, 3 Keb. 7. *Anon.* 1 Ch. Ca. 242. *Colston v. Gardner*, 2 Ch. Ca. 46.), unless a contrary intention can be collected from the whole settlement (*Anon.* Stra. 584.), or the estate is expressly limited to other uses. *Atwaters v. Birt*, Cro. Eliz. 85. But 4th, That every power reserved in a deed executing a power will be strictly construed, and therefore a mere power of revocation in such a deed will not authorize a limitation of new uses. *Ward v. Lenthal*, 1 Sid. 348." Sug. Pow. 314, 315. Upon the authority of *Wall v. Thurbourne* (1 Vern. 355.) an opinion has prevailed, that a power of revocation cannot be annexed to a power simply collateral; but such a doctrine, Mr. Sugden remarks, would be very inconvenient, and certainly cannot be considered as settled. Idem, 316. The same writer also observes, that the decisions as to the necessity of reserving a power of revocation in order to authorize a party to revoke an appointment by deed, have always been considered to apply to personal as well as real estate: and that, notwithstanding the late case of *Perrot v. Perrot*, (East, 423.), it is not, perhaps, at this day possible to contend, that an appointment by deed shall be revocable because the donee might have appointed by will, which would have been revocable. Sug. Pow. 317. 319.—[Ed.]

(A) In the former chapters of this book, the doctrine of estates has been considered, 1st, with regard to the duration, or the quantity of interest, which the owners have therein; and 2d, in respect of the number and connexion of the tenants: we are now to consider them with regard to the time of enjoyment, as they are either in possession or expectancy. Estates in possession are those where the tenant is entitled to the actual pendency of the profits. Estates in expectancy are those where the right to the pendency of the profits is postponed to some future period, and are of two sorts—remainders and reversions. An estate in remainder, says Sir William Blackstone, may be defined to be, an estate limited to take effect, and be enjoyed, after another estate is determined. As if a man, seised of lands in fee-simple, grants them to A. for twenty years, and, after the determination of that term, to

Remainder, in legal Latin, is *remanere*, coming of the Latin word *remaneo*; for that it (a) is a remainder or remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time, as in the case of Littleton (sect. 215.) appeareth (2) (b).

143 a.
(a) 2 Co. 61.
Cholmelie's
case.
(Ante 49 a.
Plowd. 26 a.
35 a.)

By section 215 it appeareth, that if a man maketh a gift in tail, the remainder in fee, without deed (b) (c), the *remainder is good, and passeth out of the donor by the livery of seisin; and so it is of a lease for life or years, the remainder over in fee; for the particular estate and the remainder, to many intents and purposes, make but one estate in judgment of law. Vide sect. 60.

(127)*
(b) 40 E. 3. 10.
10 E. 4. 1.
12 E. 4. 16.
15 E. 4. 18.
18 E. 4. 12.
18 H. 6. 4.
3 H. 7. 13.
F. N. B. 219.
11 H. 4. 39.
36 E. 3. 26.
44 E. 3. 8.
(Post, 49 b.)

If a man letteth lands or tenements by deed, or without deed (for seeing that the remainders take effect by livery, there needs no deed (3) (*), (4) *for term of years, the remainder over to another for life, or in tail, or in fee; in this case it behoveth that the lessor maketh livery of seisin to the lessee for years, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termor in this case entereth before any livery of seisin made to him, then is the freehold and also the reversion in the lessor. But if he maketh livery of seisin to the lessee, then is the freehold together with the fee to them in the remainder, according to the form of the grant, and the will of the lessor.*

LITTLETON.
[Sect. 60.
49 a.]
On lease for
years, re-
mainder for
life, &c. live-
ry of seisin
necessary.
[COKE,
49 a.]
22 H. 6. 1.
10 E. 4. 1.
18 E. 4. 13.

"Maketh livery of seisin to the lessee." This livery is not necessary in this case for the lessee himself, because he hath but a term for years, but it is for the benefit of them in the remainder, so as the livery to the lessee shall enure for the benefit of them in the remainder: for the livery *of the possession could not be made to the next in remainder, because the possession belonged to the lessee for years; and for that the particular term, and all the remainders, made in law but one estate, and take effect at one time, therefore the livery is to be made to the lessee.

49 a.
*49 b.
(Ante, 143 a.)

Littleton (sect. 721.) setteth down a rule concerning remainders, viz. every remainder which commenceth by a deed ought to vest in

378 a.
Regularly re-
mainder
should vest
at the time
the particu-

(2) See Fearn's Ess. on Cont. Rem. 3d ed. p. 5 to 11.—[Hargr. n. 2. 143 a.]

(*) See n. (c), supra.

(3) "12 H. 4. 20." Hal. MSS.—[Hargr. n. 8. 49 a.]

(4) *Un pur*, L. and M.

B. and his heirs for ever: A. is tenant for twenty years, with remainder to B. in fee. In the first place, an estate for years is created or carved out of the fee, and given to A., and then the residue or remainder of the estate is given to B. Both these interests, however, are but one estate; the present term for years, and the remainder after, when added together, being equal only to one estate in fee. They are different parts, constituting one whole, being carved out of one and the same inheritance: they are both created, and may both subsist at the same time, the one in possession, the other in expectancy. 2 Bl. Com. 164.—[Ed.]

(b) And therefore, wherever the whole fee is first limited, there can be no remainder in the strict sense of that word; for the whole being disposed of, no remnant exists to limit over. Ant. 18 a. 10 Rep. 97 b. Plowd. 29. Vaugh. 269. Dyer, 33 a. 1 Ab. Eq. 186.—[Ed.]

(c) That is, at common law, before the 29 Car. 2. c. 3.—[Ed.]

lar estate is created: (Plovd. 25 a. 20 a. 2 Cro. 360.)

(128)*
(c) 7 R. 2.
Scire facias.
(Ante, 354 b.)

him to whom it is limited, when livery of seisin is made to him that hath the particular estate (b).

*First Littleton saith by deed, (c) because if lands be granted and rendered by fine for life, the remainder in tail, the remainder in fee, none of these remainders are in them in the remainder, until the particular estate be executed.

but a contingent remainder is good, if it take effect during the particular estate. (Cro. Ells. 360.) (2 Rol. Abr. 419.) (d) 32 H. 6. tit. Feoffments and Fines 99. 17 E. 3. 87. 11 R. 2. De tinue 46.

2 H. 7. 13. 12 H. 7. 27. 12 E. 4. 2. 21 H. 7. 11. 7 H. 4. 23. 11 H. 4. 74. 18 H. 6. 2. 27 H. 8. 42. 38 E. 3. 26. 30 Ass. 47. 6 R. 2. qu. Jur. clam. 20. (1 Rep. 94.)

(e) Pl. Com. Colliam's case, fol. 25. 28. (3 Rep. 20. 2 Rep. 87 a. b.)

(e) And so it is, if a man make a lease for life to A. B. and C., and if B. survive C. then the remainder to B. and his heirs. Here is another exception out of the said rule; for albeit the person be certain, yet, inasmuch as it depends upon the dying of C. before B., the remainder cannot vest in B. presently (e). And the reason of

(b) Remainders are either vested or contingent. Vested remainders, or remainders executed, are those by which a present interest passes to the party, though to be enjoyed *in futuro*; and by which the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As if A. be tenant for years, remainder to B. in fee; hereby B.'s remainder is vested, which nothing can defeat or set aside. 2 Bl. Com. 169. The person entitled to a vested remainder has an immediate fixed right of future enjoyment, that is, an estate *in presenti*; though it is only to take effect in possession and pendency of the profits at a future period. And such an estate may be transferred, aliened, and charged, much in the same manner as an estate in possession. 2 Cro. Dig. 260, 261. Prest. Est. 33.

A remainder is contingent when it is limited to take effect on an event or condition, which may not happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate; in which case such remainder never can take effect. Fearn. Cont. Rem. 3. It is not, however, the uncertainty of ever taking effect in possession, that makes a remainder contingent, for to that every remainder for life, or in tail, expectant on an estate for life, is and must be liable; as the remainder-man may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. Fearn. Cont. Rem. 329. Prest. Est. 32, 33.—[Ed.]

(e) So where a devise was to G. L. the testator's heir at law, for life, and from and after his death to C. B. her heirs and assigns, in case she shall survive and outlive the said G. L. but not otherwise; and in case she shall die in the life-time of the said G. L., then to G. L. his heirs and assigns for ever; it was held, that the devise to C. B. was a contingent remainder. *Doe d. Planner v. Scudamore*, 2 Bos. & P. 289.

According to Mr. Fearn, there are four kinds of contingent remainders:—1st. Where the remainder depends entirely on a contingent determination of the preceding estate itself. As if A. makes a feoffment to the use of B. till C. returns from Rome, and after such return of C. then to remain over in fee; here the particular estate is limited to determine on the return of C. and only on that determination of it is the remainder to take effect; but

that is an event which possibly may never happen; and, therefore, the remainder, which depends entirely upon the determination of the preceding estate by it, is contingent. 3 Rep. 20 a. Et vid. *Arton v. Hare*, Poph. 97. *Large's case*, 3 Leon. 182. 2d. Where some uncertain event, unconnected with, and collateral to the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder; as in the case of *Doc d. Planner v. Scudamore*, cited above, and in the instance put by Lord Coke of a lease for life to A., B., and C., and if B. survive C. then the remainder to B. and his heirs; here the event of B.'s surviving C. does not affect the determination of the particular estate; nevertheless, it must precede and give effect to B.'s remainder; but as such event is dubious, the remainder is contingent. Fearn. Cont. Rem. 4, 5. 3d. Where it is limited to take effect upon an event, which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate; as if a lease be made to I. S. for life, and after the death of J. D. the lands to remain to another in fee; now it is certain that J. D. must die some time or other; but his death may not happen till after the determination of the particular estate by the death of J. S. and therefore such remainder is contingent. 3 Rep. 20 a. And 4th. Where it is limited to a person not ascertained, or not in being at the time when such limitation is made; as if a lease be made to one for life, remainder to the right heirs of J. S. Supra, 378 a. Et vid. 3 Rep. 20 a. So where a remainder is limited to the first son of B. who has no son then born; here B. may never have a son, or if he should, the particular estate may determine before the birth of such son; therefore this remainder is contingent. 1 Ventr. 806. So if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent; because it is uncertain which of them will be the survivor. Cro. Car. 102. Fearn. Cont. Rem. 6. It should, however, be observed, that there are some cases which fall literally under one or other of the 3d and 4th descriptions, which are nevertheless ranked among vested estates. With respect to those cases which are exceptions to the third kind of contingent remainders, it has been held, that a limitation to A. for eighty or ninety years, if he shall so long live, with a remainder over, after the death of A., to B. in fee, is not deemed a contingent remainder: for the mere possibility, that a life in being may endure for eighty or ninety years after such a limitation is made, does not amount to a degree of uncertainty sufficient to render a remainder contingent. *Napper v. Sanders*, Hutt. 119. *Lord Derby's case*, Lit. Rep. 370. Pollexf. 67. But if the term of years is so short, as to leave a common possibility, that the life on which it is determinable may exceed it, the remainder will be deemed contingent. And therefore, if an estate is limited to A. for twenty-one years, if he shall so long live, and after his death to B. in fee, this is a contingent remainder; because there is no improbability in supposing that the life may exceed the term. 3 Rep. 20 a. Et vid. *Beverley v. Beverley*, 2 Vern. 131. Fearn. Cont. Rem. 20, 23. The exceptions to the fourth sort of contingent remainders arise, first, from a rule of law, that wherever the ancestor takes an estate of freehold, and a remainder is thereon limited in the same conveyance to his heirs, or to the heirs of his body, such remainder is immediately executed in the ancestor so taking the freehold, and is not contingent. *Shelley's case*, 1 Rep. 104. Fearn. Cont. Rem. 30. Infra n. (p). Secondly, from a principle that an ultimate limitation to the right heirs of the grantor will continue in him, as his old reversion, and not as a remainder, although the freehold be expressly limited from him. Post, 22 b. Thirdly, from the respect which the law pays to the intent of a testator, where it can be plainly collected from his will, that he used the words *heirs of the body*, as a *descriptio personarum*, or sufficient designation of the person for the remainder to vest, notwithstanding the general rule, that *nemo est heres viventis*. Fearn. Cont. Rem. 319. But the cases falling under this last exception, have been either, where the limitation to the heir special has been qualified by the words "now living," or some other circumstances have appeared in the will, to manifest the testator's intention, that the estate should vest. See *Burchett v. Durdant*, 3 Ventr. 311. Cart. 154. *Long v. Beaumont*, 1 P. Wms. 229. 1 Eq. Abr. 114. 2 Eq. Abr. 331. 1 Bro. P. C. 489. *Goodright v. White*, 2 Bl. Rep. 1010. And it is also observable, that there was not one of these cases in which the ancestor took the legal estate of freehold. To sum up the distinctions between vested and contingent remainders, it may be observed, that wherever the preceding estate is limited, so as to determine on an event which certainly must happen; and the remainder is so limited to a person in esse and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. *Berrington v. Parkhurst*, 3 Atk. 155. Willes, 327. 6 Bro. P. C. 352. On the contrary, wherever the preceding estate (except in the cases before-mentioned, as exceptions to the descriptions of a contingent remainder) is limited so as to determine only on an event which is uncertain, and may never happen; or wherever the remainder is limited to a person not in esse, or not ascertained; or wherever it is limited so

as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent. Fearn. Cont. Rem. 330, 331.

With respect to the effect of contingent remainders intervening between the particular estate and the remainders over, in making them contingent, it is observable, that wherever a contingent remainder is limited, which is followed by another limitation over, if the contingent limitation be not in fee, the subsequent limitation may be vested, if it be made to a person in esse. Fern. Cont. Rem. 338. As upon a feoffment to the use of the feoffees during the life of A., and after his death, to the use of his first and other sons successively in tail, with several remainders over; and A. having no sons at the time of the feoffment, it was resolved that all the uses limited to persons not in esse were contingent, but the uses to persons in esse were vested immediately; and that the contingent uses when they should come in esse, would vest by interposition, if the estate for life, which ought to support them, was not disturbed. *Chudleigh's case*, 1 Rep. 137. And where, in the same conveyance, an estate for life is limited to a person, and after that a contingent remainder to another, followed by a remainder to the heirs or heirs special of the first tenant for life, this last limitation shall be esteemed executed only *sub modo*; that is, in such manner as to open and separate itself from the first estate for life, when the contingency happens. *Lewis Boules' case*, 11 Rep. 80. The preceding cases are instances, where the contingency of the intervening remainders arose from their being limited to persons not in esse. But if there be a remainder limited to a person in esse, so as to depend on a contingent event, if the same contingency be not considered as extending to the subsequent limitations, such of those limitations as are to persons in esse may be vested; as in the case of *Napper v. Sanders*, Hutt. 119; where, upon a feoffment made by A. to the use of himself for life, and after to the use of the feoffees for eighty years, if B. and C. his wife should so long live; and if C. survived B. her husband, then to the use of her for life; and after her decease to the use of D. in tail, remainder over; though it was agreed, that C.'s estate for life was contingent, on the event of her surviving husband, yet it was held, that the subsequent remainders were vested. Et vid. *Tracey v. Lethulier*, 3 Atk. 774. Amb. 204. *Whitfield v. Bewit*, 2 P. Wms. 240. So a subsequent contingent remainder may become vested in interest before a preceding one, which will be no obstruction to its so vesting. *Uvedale v. Uvedale*, 2 Roll. Abr. 111. But where there is a contingent limitation in fee absolute, no estate limited afterwards can be vested. *Loddington v. Kyme*, 1 Salk. 224. Ld. Raym. 208. *Doe v. Holmes*, 3 Wils. 237. 241. 2 Bla. 777. *Goodright v. Dunham*, Dougl. 251. *Doe v. Perryn*, 3 T. R. 484. It seems, however, that a contingent interminable fee, devised in trust for some special purposes only, will not prevent a subsequent limitation to one in esse from being vested. See *Tracey v. Lethulier*, supra. Fearn. Cont. Rem. 342. Sed vid. n. (a), 6th edit. p. 226. And where estates are subject to a power of appointment in the first taker, with remainders over in default of such appointment, such a power does not suspend the effect of the subsequent limitations, and keep them in contingency. Fearn. Cont. Rem. 343, 344. Et vid. acc. *Maundrell v. Maundrell*, 7 Ves. 567. 10 Ves. 246. Sugd. Pow. 141. It is further to be observed, that although a fee cannot, in conveyance at common law, be mounted on a fee, yet two or more several contingent fees may be limited, merely as substitutes or alternatives, one for the other, and not to interfere; but so that one only can take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect, *Loddington v. Kyme*, 1 Ld. Raym. 203. *Barnardiston v. Carter*, 3 Bro. P. C. 64. *Doe v. Holme*, 2 Bla. 777. Fearn. Cont. Rem. 547. 550; as where a will was made in these words: "I give my messuage, &c. to my son J. S. for his life, and after his death unto all and every his children equally, and to their heirs; and in case he dies without issue, I give the said premises unto my two daughters and their heirs, equally to be divided between them;" it was determined, that both the devisees were contingent remainders in fee. *Goodright v. Dunham*, Dougl. 265. Et vid. *Doe v. Perryn*, 3 T. R. 484. *Ives v. Legge*, cited 3 T. R. 488. *Crump, d. Woolley v. Norwood*, 2 Marsh. 161. Such limitations are sometimes called limitations on a contingency with a double aspect; sometimes limitations on a double contingency; and sometimes concurrent or contemporary limitations; as to which denominations see Mr. Douglas's note (2), *Doe v. Fonnercau*, Dougl. 504. But in all cases where the first contingent remainder is in fee, or where there are concurrent remainders, if the first remainder becomes vested, all the subsequent remainders are void: for then they become remainders expectant on the determination of an estate in fee-simple. 2 Cru. Dig. 286. *Keene v. Dickson*, 3 T. R. 495.

As to the cases wherein a contingency annexed to a preceding estate is, or is not, considered as a condition precedent to give effect to the ulterior limitations, such cases may be distinguished into three classes. 1st. Limitations, after a preceding estate, which is made

both these cases in effect is, because the remainder is to commence upon limitation of time, viz. upon the possibility of the death of one man before another, which is a common possibility (f).

(f) Here we shall offer some remarks, 1st. With respect to the nature of the event upon which a contingent remainder may be limited. 2d. As to the estate necessary to support a contingent remainder. The doctrine with respect to the time when a contingent remainder must vest, will be explained in a subsequent part of this chapter.

1st. With respect to the nature of the contingency upon which a remainder may be limited:—It is to be observed, 1st. That it must be a legal act, “for the law (says Lord Coke, 2 Rep. 51 b.) will never adjudge a grant good by reason of a possibility or expectation of a thing which is against law; for it is *potentia remotissima et vana*, which by intendment of law *nunquam venit in actum*.” 2d. It must be *potentia propinqua*; as death, or death without issue, or coverture. Hence it has been determined, that a remainder to a corporation, which is not in being at the time of the limitation, is void, although it be erected afterwards, during the particular estate. 2 Rep. 51 a. So, although a lease for life, remainder to the right heirs of J. S. is good; yet, if there be no such person as J. S. at the time of the limitation of the remainder, notwithstanding such a person should afterwards be born, and die during the life of the tenant for life, his heir shall not take by virtue of such limitation; because the possibility on which the remainder is to take effect is too remote; for it amounts to the concurrence of two several contingencies, viz. 1st. That such a person as J. S. should be born, which is very uncertain; and 2dly. That he should also die during the particular estate, which is another uncertainty grafted upon the former. This is called a possibility upon a possibility, which Lord Coke observes, is never admitted by intendment of law. Ant. 25 b. vol. 1. p. 541; 184 a. vol. 1. p. 743. *Cholmley’s case*, 2 Co. 51 b. Upon the same ground arises the distinction between a remainder limited by a general description, as to the right heirs of J. D., who is alive, or *primogenito filio* of B., who has no son then born, which is good; and one limited by a particular name to a person not in esse, which is void. Fearn. Cont. Rem. 375. 378. 3d. It must not be repugnant to any rule of law. 6 Rep. 40 b. 4 Burr. 1941. 4th. Nor contrariant in itself. *Sermin v. Arcot*, 1 Rep. 85 a. *Cholmley v. Humble*, 1 Rep. 86 a. *Corbel’s case*, 1 Rep. 83 b. *Mildmay’s case*, 6 Rep. 40. *Foy v. Hinde*, Cro. Jac. 697. 5th. That it must not operate so as to abridge, defeat, or determine the particular estate. Plowd. 29 b. 2 Leon. 16. Plowd. 24. • *Sayer v. Hardy*, Cro. Eliz. 414. This rule not only flows, of necessity, from the nature of a remainder, as exhibited in the above definition of it by Lord Coke, but also follows, as the consequence of a maxim at common law, that none shall take advantage of a condition, but the party from whom the condition moves (i. e. the grantor) and his heirs; for, if he or his heirs take advantage of a condition, by entry or claim, the livery made upon the creation of the estates is defeated; and, of course, every estate then created is thereby annulled and gone. But the remainder ought to vest at the instant of the expiration of the preceding estate, and remainders are defeated by the entry of the grantor, therefore such remainder is void. It follows, that a remainder properly so called, cannot be limited to take effect upon a condition, which is to defeat the particular estate, whether such condition be repugnant to the nature of the estate to which it is annexed, or not. Fearn. Cont. Rem. 391. And the same law holds with regard to a subsequent remainder, limited to take effect on a condition, which is to defeat a preceding remainder. *Cogan v. Cogan*, Cro. Eliz. 360. Where, however, land is leased to one for life, and, if such a thing happen, then to remain to B., this shall not be understood as intended to vest in possession, immediately upon the happening of the condition, and in abridgment of the preceding estate; for then, by the last mentioned rule, the remainder would be void; but it shall be construed to vest in interest upon the happening of the condition, and to remain as a remainder ought to do; that is, so as to await the determination of the preceding estate, before it comes into possession. *Colthirst v. Bejushin*, Plowd. 23. Fearn. Cont. Rem. 393. It may also happen, that notwithstanding a contingent limitation is expressed to commence from a period eventually anterior to the determination of the particular estate, yet the nature of the case may be such, as not to admit of its taking effect in possession in restraint, abridgment, or exclusion of the particular estate; as if such limitation over were to the grantee or devisee of the particular estate; which, instead of operating in any degree to defeat, exclude, or curtail the particular estate, would in effect remove its limits, and open it into a greater estate. Thus, in the case of a lease to two, with a limitation over, after the death of the first of them, to the survivor, this does not

avoid, defeat, or abridge the estate of the survivor, but embraces it under the afflux of a greater, into which it will run under the technical term of merging, instead of being rescinded or nullified. The grantor or his heir can have no title to enter and defeat the particular estate, because there is no condition or proviso to make it cease, or carry the estate either expressly or implicatively to any body, from the devisee of the particular estate. Nor can the limitation operate to the prejudice of another, viz. the person otherwise entitled to the particular estate; because it is to that very person himself, and the effect would have been precisely the same, if the limitation had been, and from and after the determination of the estate aforesaid, then to the survivor in fee. Nothing, therefore, will, in such case, prevent the limitation over from operating strictly, as a remainder at common law. *Goodtitle v. Billington*, Dougl. 725. Fearn. Cont. Rem. 397, 8. It is further to be observed, that although no remainder can be limited on a condition; yet, it has been long settled, that, where in a devise a condition is annexed to a preceding estate, and upon the breach or non-performance thereof, the estate is devised over to another, the condition shall operate as a limitation, circumscribing the measure and continuance of the first estate; and that upon the breach or performance of it, as the case may be, the first estate shall ipso facto determine and expire, without entry or claim; and the limitation over shall thereupon actually commence in possession; and the person claiming under it, whether heir or stranger, shall have an immediate right to the estate. Thus is the testator's intention effectuated, by substantiating the subsequent estate, though limited to a stranger; and enforcing the performance of the condition, by the determination of the preceding estate upon the breach of it, notwithstanding that preceding estate be limited to the heir himself: and limitations of this kind are properly called *conditional limitations*. Fearn. Cont. Rem. 405—9. Thus, where a person devised lands to his mother for life, and after her death to his brother in fee; provided that if his wife (being then enseint) be delivered of a son, that then the land should remain to him in fee; after the testator's death, a son was born; and it was held, that the fee of the brother should cease, and vest in the son upon the happening of the contingency. *Dyer*, 127 n. Id. 33 n. *Cro. Jac.* 592. *Palm.* 135. So, where A. devised lands to his wife for life, and after her death to his grandchild B. and the heirs of her body; provided always, and upon condition that she married with the consent of D., E., and F., or the major part of them, and in case she should marry without such consent, or die without issue, then he devised the premises to C. (neither B. nor C. being heir at law to the testator). After the testator's death B. married without the consent of any of the persons named for that purpose; and it was clearly held to be an estate to B. till she married without such consent; that here was an estate-tail devised to B. subject to two limitations, the one in law, viz. dying without issue, the other express, and in fact, viz. marrying without consent; which was properly a conditional limitation, and not a condition; for, if it were a condition, it would descend to the heir at law, and he might enter for breach of it, and defeat the limitation over; and it was therefore agreed, that the marriage without consent determined her estate-tail, and cast the possession immediately on C. *Lady Ann Fry's case*, 1 Ventr. 199. Et vid. *Shuttleworth v. Barber*, 2 Mod. 7. But where there is no express limitations over to take effect upon the breach or performance of the condition, annexed to the preceding estate; there, it seems, the condition or proviso is not always construed as a conditional limitation. *Gulliver v. Ashby*, Fearn. Ex. Dev. 60. Limitations of this nature may also take effect by way of use; for a use may be limited to cease as to one person upon a future event, and to vest in another. Fearn. Cont. Rem. 412. With respect to those cases where a particular estate is limited, with a condition, that after the performance of a certain act, or the happening of a certain event, the person to whom the first estate is limited, shall have a larger estate, see the last chapter, ante, p. 18. n. (1).

2d. As to the estate necessary to support a contingent remainder:—Though in the case of a vested remainder it is sufficient, if the particular estate be for years (for a lease at will is of too slender and precarious a nature to support a remainder over. 8 Rep. 75.), it is a general rule, that wherever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it. Fearn. Cont. Rem. 423. Thus, if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void: but if granted to A. for life, with a like remainder, it is good. 1 Rep. 130. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void; it cannot pass out of him without vesting somewhere; and in the case of a contingent remainder, it must vest in the particular tenant, else it can vest nowhere: unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him; and consequently the remainder is void. 2 Bl. Com. 171. Fearn. Cont. Rem. 423, 24, 25. 3 Rep. 20. But a contingent remainder for years does not require a preceding freehold to support it; for the remainder not being freehold, no such

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On particular estate being defeated, the remainder also defeated.

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Vid. Pl. Com. Colthrat's case. (Fost, 333 a b.)

(135)*

But a remainder vested by good title may be good, though the particular estate be defeasible;

*It is regularly true, that when the particular estate is defeated, that the remainder thereby shall be also defeated, but it faileth in divers cases.

*For where the particular estate and the remainder depend upon one title, there the defeating of the particular estate is a *defeating of the remainder. But where the particular estate is defeasible, and the remainder by good title, there, though the particular estate be defeated, the remainder is good. As if the lessor disseise A. lessee for life, and make a lease to B. for the life of A. the remainder to C. in fee, albeit A. re-enter, and defeat the estate for life, yet the remainder to C., being once vested by good title, shall not be avoided; for it were against reason, that the lessor should have the remainder again against his own livery; and this is well warranted by the reason of Littleton, in section 521. So it is, if a lease be made to an infant for life, the remainder in fee, the infant at his full age disagree to the estate for life, yet the remainder is good, for that it was once vested by good title; for in both these cases there was a particular estate at the time of the remainder created.

estate appears requisite to pass out of the grantor, in order to give due effect to a remainder of that sort. Fearn. Cont. Rem. 429, 43. Although every contingent freehold remainder must be supported by a preceding freehold, yet it is not necessary that such preceding estate continue in the actual seisin of its rightful tenant; it is sufficient, if there subsists a right to such preceding estate, at the time the remainder should vest; provided such right be a right of entry, and not a right of action only; for, whilst a right of entry remains, there can be no doubt that the same estate continues; since the right of entry can exist only in consequence of the subsistence of the estate; but when the right of entry is gone, and nothing but a right of action remains, it then becomes a question of law, whether the same estate continues or not; for the action is nothing more than the means of deciding the question. Another estate is, in the mean time, acknowledged and protected by the law, till such question be solemnly determined in a court of Justice, upon the action brought. Fearn. Cont. Rem. 430, 431. Therefore, if A. be tenant for life, with a contingent remainder over, and tenant for life be disseised, all the estates are divested; but the right of entry of the tenant for life will support the contingent remainders; but in this case if the contingent remainder does not vest, before such a descent be cast as will take away the entry of tenant for life within the stat. 32 H. 8. c. 33, and drive him to his action, then is the contingent remainder gone; because there no longer subsists any right of entry to support it, that right being turned into a right of action. *Thomson v. Leach*, 19 Mod. 174. And for the same reason, where a contingent remainder is limited after an estate-tail, and the tenant in tail creates a discontinuance, the contingent remainder will be destroyed. 1 Rép. 135 b. This right of entry, however, to support a contingent remainder must be a present right; a future one will not do: it must also precede the contingency, and be actually existing when that happens; for if it only commences at the same instant with it, the remainder, it seems, will not vest. Fearn. Cont. Rem. 433. And where the estates are limited by way of use, and are afterwards divested and turned to a right, it has been held that there must be an actual entry, in order to revert the estates. Fearn. Cont. Rem. 435. In regard to the estate requisite to support a contingent remainder, it is further to be observed, that the estate supporting, and the remainder supported, should both be created by one and the same deed or instrument: therefore an estate for life given by one deed, will not support a remainder given by another; nor an estate for life settled by A. on B. by deed, enure to support a contingent remainder given by the will of A. Fearn. Cont. Rem. 446, 447. Et vid. *Snow v. Cutler*, Raym. 169. *Moor v. Parker*, 4 Mod. 316. *Weale v. Lower*, Pollexf. 66. *Doe v. Fonnereau*, Dougl. 486. It seems, however, that where the legal estate is in trustees, there is no necessity for any preceding particular estate of freehold, to support contingent remainders; for the legal estate in the general trustees will be sufficient for the purpose; and consequently, in such cases, it is not necessary, that a contingent remainder should vest by the time the preceding trust limitation expires. Fearn. Cont. Rem. 449, 450. Et vid. *Chapman v. Blissett*, Cas. Temp. Talb. 145. *Hopkins v. Hopkins*, Forrest. 44. 1 Ves. 268. 1 Atk. 591.—[Ed.]

If a lease be made to A. for the life of B., the remainder to C. (136)
 in fee, A. dieth; before an occupant entereth, here is a remainder or become in
 without a particular estate, and yet the remainder continueth good abeyance;
 (1). 17 E. 3. 43.

A rent is granted to the tenant of the land for life, the remainder in fee (H), this is a good remainder, albeit the particular estate continued not; for *eo instante* that he took the particular estate, *eo instante* the remainder vested, and the suspension in judgment of law grew after the taking of the particular estate (2).

*If a man grant a rent to B. for the life of Alice, the remainder to the heirs of the body of Alice, this is a good remainder, and yet it must vest upon an instant (1) (K).

or suspended.
 3 E. 3. Abb.
 Ass. (Flo. 35a.
 Vaugh. 300.
 Moor. 664.
 Yelv. 8. 2
 Rol. Abr. 415.
 7 H. 4. 6.
 1 Rep. 66.
 Noy. 47.)

(137)*
 A remainder
 may vest at
 the instant
 the particular
 estate de-
 termines.

(1) But since the 29 Car. 2. c. 3. s. 12. and 14 Geo. 2. c. 20. s. 9., no such vacancy can now happen. Vid. ante, n. 5. 41. 3., and *Atkinson v. Baker*, 4 T. R. 230. [*Butler*.]

(H) Rents, as we observed in a former chapter, admit of the same limitations as other hereditaments. A distinction, however, is observable with regard to the intail of rents. For if a rent be granted *de novo* to A. in tail, *without a remainder over*, and A. suffer a recovery, he shall only acquire a *base fee, determinable on failure of his issue*; for the recovery, though it may bar the estate-tail, cannot give to the rent a continuance beyond the period limited by the original grant. *Chaplin v. Chaplin*, 3 P. Wms. 229. But where the estate-tail is derived out of a fee-simple already existing in the rent; or the estate-tail is limited on its first creation with remainders over, the recovery of tenant in tail, duly suffered, will acquire the whole dominion or ownership in the rent to the extent of the estate-tail and remainders. *Smith v. Farnaby*, Cart. 52. Sid. 285. *Weeks v. Peach*, 2 Lutw. 1218. 1 Prest. Convey. 3.—[*Ed.*]

(2) See Mr. *Butler's* note at the end of the volume, Note III.

(1) Formerly the doctrine that the necessity that the remainder should vest at the very instant of the determination of the particular estate at farthest, was extended to the case of a posthumous son. In the case of *Reeve v. Long*, 1 Salk. 227, an estate was limited to A. for life, remainder to his eldest son in tail; A. died, leaving his wife *enfeint*. She afterwards had a son. It was adjudged that the son not being in *esse* at the time of the particular estate, could not take under the limitation. This judgment was afterwards affirmed in the Court of King's Bench; but it was reversed in the House of Lords, against the opinion of all the judges. To obviate all doubts respecting the law in this case, the statute of 10 Will. III. c. 16, was passed, by which it was enacted, that where any estate is by marriage, or any other settlement, settled in remainder to children, with remainders over, any posthumous child may take in the same manner as if born in the father's life-time. It is singular that this statute does not expressly mention limitations or devises made by wills. There is a tradition, that as the case of *Reeve v. Long* arose upon a will, the lords considered the law to be settled by their determination in that case; and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination. Besides, in the above case of *Reeve v. Long*, the words of the act may be construed, without much violence, to comprise settlements of estates made by will, as well as settlements of estates made by deed. [*Butler*. Note 259.]

As the statute says the posthumous son in this case shall take the estate as if born before the death of the father, he is entitled to the intermediate profits from the death of the father, which is different from the case of a descent devested by the birth of a posthumous child. *Bassett v. Bassett*, 8 Vin. Abr. 87. 3 Atk. 203. Post, 11 b. n. (4).

Though at the common law, and under the learning of remainders, a gift to a class of persons will not admit to a participation, any who are born after the determination of a particular estate; yet such afterborn persons may take under a gift operating by executory devise, or springing or shifting use. *Mogg v. Mogg*, 1 Meriv. 654. 3 Prest. Convey. 555.—[*Ed.*]

(x) So, if land be given to A. and B. during their joint lives, remainder to the right

(138)*

142 b.

Definition of
a reversion.
Post, 22 b.

*A reversion, *reversio*, cometh of the Latin word *revertor*, and signifieth a returning again; and therefore *reversio terræ est tanquam terra revertens in possessione donatori, sive hæredibus suis*

heirs of him who shall die first, this remainder will be good, though it cannot vest before the determination of the particular estate. Post, 378 b.

With respect to the time for the vesting of contingent remainders, it may be further observed, that from the principle, that a contingent remainder must vest at or before the determination of the particular estate, it follows, that an estate, limited on a contingency, may fail as to one part, and take effect as to another, wherever the preceding estate is in several persons, in common or in severalty; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it. *Lane v. Pannell*, 1 Rol. Rep. 238. 317. 438. Fearn. Cont. Rem. 458. So likewise a contingent remainder may take effect in some, and not in all the persons to whom it was limited; according as some may come in esse before the determination of the particular estate, and others not. Comb. 467. Et vid. Ant. 9 a. vol. i. p. 496. This doctrine, however, seems confined to limitations at common law; and not to extend to estates raised by way of use (Comb. 467. *Matthews v. Temple*, 1 Ld. Raym. 311.), or by devise. *Oates v. Jackson*, 2 Stra. 1172. *Doe, d. Comberbach v. Perryn*, 3 T. R. 484. And here it may be observed, that if there be no particular estate in esse, nor any present right of entry when the contingency happens; although the particular estate be afterwards replaced and restored, yet the remainder will never arise. 2 Salk. 577. 2 Lev. 39. Only it seems, that the reversal of a fine by act of parliament, will restore a contingent remainder destroyed by that fine, though a reversal for error will not. 3 Keb. 87. *Cole v. Levingstone*, 1 Ld. Raym. 314. Fearn. Cont. Rem. 464.

With regard to the ways by which contingent remainders may be destroyed, it has been already stated, that a legal remainder must vest either during the existence of the particular estate, in esse or in right of entry, or at the very instant of its determination; otherwise it will never take effect at all; consequently every such determination of the preceding estate before the contingency happens, as leaves no right of entry, must effectually destroy such contingent remainder. Fearn. Cont. Rem. 465. Therefore, where there is tenant for life, with a contingent remainder expectant on his estate, if he makes a feoffment, or levies a fine, or suffers a recovery (*Archer's case*, 1 Rep. 66. Cro. Eliz. 630. 1 Salk. 224.), or surrenders his life estate (*Thompson v. Leach*, 2 Salk. 427.), it will destroy the contingent remainder. And where there is a tenant for life, with all the subsequent remainders contingent, and he suffers a recovery to the use of himself in fee, he has a right to this tortious fee against all persons but the heirs of the grantor or deviser. 1 Salk. 214. But a bargain and sale, or lease and release, by the tenant for life, will not destroy the contingent remainders; because these conveyances only transfer what the person seised of the land may lawfully convey, and do not divest any estate, 2 Lev. 60. 3 Mod. 151.: though it is otherwise if such conveyance be made to the person who has the immediate vested reversion, or remainder; or if such person joins in the conveyance, or if the tenant for life who makes the conveyance, has the remainder or reversion. Fearn. Cont. Rem. 6th edit. 322. So, although, if a tenant for life accepts a fine from a stranger, it is a forfeiture of his estate, so as to entitle a remainder-man to enter; yet it does not displace or divest the remainder or reversion. *Lloyd v. Brooking*, 1 Vent. 188. But an extinguishment of the particular estate will destroy a contingent remainder. *Purefoy v. Rogers*, 2 Saund. 386. 4 Mod. 284. And any alteration in the quantity of the particular estate, before the remainder vests, will destroy it; though it seems otherwise as to an alteration in its quality only. Fearn. Cont. Rem. 496. We have seen, that where a particular estate is limited with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the same conveyance, the contingent remainder is not destroyed; but such last limitation shall be considered as executed only *sub modo*; that is, upon such condition, as to open and separate itself from the first estate, when the condition happens, and by no means destroy or preclude the particular estate. Ant. 184 a. vol. i. p. 746. *Infra*, n. (F). p. 144. *Lewis Bowles' case*, 11 Rep. 97. So where the inheritance becomes united to the particular estate, by an immediate descent from the person by whose will the particular estate and contingent remainders were limited, there the contingent remainders will not be destroyed. *Archer's case*, 1 Rep. 66. *Plunkett v. Holmes*, Raym. 28. *Doe, d. Planner v. Scudamore*, 2 Bos. & Pul. 295. But where the accession of the inheritance is by a conveyance, accident, or circumstance, distinct from that conveyance which created the parti-

post donum finitum, &c. as in the cases that Littleton (sect. 215.) hath put.

Plowd. 151 a.
122 a. Cro.
Cha. 400. 548.
2 Rol. Abr.
60.)

cular estate; or where the descent of the inheritance on the particular estate is only mediate from the person whose will created the particular estate, and the remainder, there is no necessity to exempt the particular estate from the operation of merger by descent; and therefore, on such event happening, the contingent remainder will be destroyed. *Kent v. Harpool*, 1 Vent. 306. *Jones*, 76. *Hooker v. Hooker*, Rep. Temp. Hardw. 13. *Fearn. Cont. Rem.* 503. 507.

The several ways whereby contingent remainders may be defeated having been considered, it remains to advert to the mode invented to preserve them from being destroyed, namely, by the intervention of trustees. This is done by limiting an estate to trustees and their heirs, to commence from the determination of the particular estate, by forfeiture or otherwise, in the life-time of the tenant for life, and to continue during the life of the tenant for life, upon trust, to support the contingent remainders afterwards limited, from being defeated or destroyed; by which means, if the tenant for life should alien or forfeit his estate, or if it should be merged or destroyed by any other means, the trustees, having a vested remainder, immediately acquire a right of entry, which, as we before observed, is sufficient to support the contingent remainders. This improvement is generally attributed to Sir Orlando Bridgeman and Sir Geoffrey Palmer, who retired from the bar during the civil wars, and confined themselves to conveyancing. And when, after the restoration, these persons came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use. 2 Bl. Com. 172. 2 Cru. Dig. 381, 2. But trustees to preserve contingent remainders are not necessary where the contingent limitations are only trusts; for a conveyance by a *cestui que* trust will not destroy a contingent remainder expectant on his estate; because the legal estate being in his trustees, there remains a right of entry in them which will support the remainders. *Fearn. Cont. Rem.* 479. It should also be observed, that where an estate is limited in a bargain and sale, or covenant to stand seised, to a stranger, upon trust to preserve contingent remainders, it will be void; because no use will arise under these conveyances without a consideration. 2 Cru. Dig. 382. Trustees to preserve contingent remainders being appointed to preserve estates in families, and for no other purpose, if, instead of so doing, they join in a conveyance to destroy the remainders, such conduct will be a breach of trust, and they will be answerable for the same; and any person taking under such conveyance, if voluntarily, or having notice, will be liable to the same trusts. *Pye v. George*, 1 P. Wms. 128. *Mansell v. Mansell*, 2 P. Wms. 678. *Forrest*. 252. *Moody v. Walters*, 16 Ves. 303. 307. *Bischope v. Perkins*, 1 Ves. & B. 491. There have been some cases, however, wherein a court of equity has refused to punish trustees for joining in a conveyance to destroy contingent remainders: As where, upon a subsequent remainder to the right heirs, a collateral relation only has been affected by it, there having been no issue of the marriage. *Tipping v. Pigot*, 1 Ab. Eq. 385. So also, where the application to the court for relief has been made by one who was not at the time, nor possibly ever might be, entitled to the remainder, under the words of the limitation. *Else v. Osborn*, 1 P. Wms. 387. *Fearn. Cont. Rem.* 481. In some instances, also, the court has directed the trustees to join with the tenant for life, or his first son, in barring the subsequent contingent remainders. But this has only happened under peculiar circumstances, either of pressure to discharge incumbrances prior to the settlement, *Platt v. Sprigg*, 2 Vern. 303; or in favour of creditors where the settlement was voluntary, *Bassett v. Clapham*, 1 P. Wms. 358. *Moody v. Walters*, 16 Ves. 305; or for the advantage of the persons who were the first objects of the settlement; as to enable the eldest son to make a settlement upon an advantageous marriage. *Winnington v. Foley*, 1 P. Wms. 536. *Fearn. Cont. Rem.* 483, 484. But, however, the court of chancery may judge it proper to direct trustees to concur in destroying contingent remainders, under the above-mentioned circumstances, it has repeatedly denied the same interposition, in cases where such ingredients were wanting. See *Davies v. Weld*, 1 Vern. 181. 1 Ab. Eq. 386. *Thomson v. Lawton*, 2 P. Wms. 379. *Symance v. Tattam*, 1 Atk. 613. *Woodhouse v. Hoskins*, *Forrest*. MSS. 3 Atk. 22. *Barnard v. Large*, 2 P. Wms. 684 n. *Ambl.* 774. 1 Bro. C. C. 534. *Moody v. Walters*, 16 Ves. 291. In the above-mentioned cases of *Woodhouse v. Hoskins*, and *Barnard v. Large*, a distinction was made between punishing trustees for joining, in some cases, to destroy contingent remainders, and the compelling them to join. This distinction seems to flow from the supposing any discretion at all in the trustees, in cases of this nature; because there may be circumstances sufficient to justify, though short of an obligatory call for such an exercise of their discretion. But however

(140)* *A reversion is (5) where the residue of the estate always doth
 22 b. continue in him that made the particular estate, or where the par-
 (Ante, 142b. ticular estate is derived out of his estate (1), as in the case of Little-
 Plowd. 181.

(5) By what words a reversion will pass, see Vin. Abr. *Reversion*, G. and Com. Dig. *Estates*, B. 12.—[Hargr. n. 1. 22 b.]

this may be, says Mr. Fearn, it seems the safest way for trustees, not to act, except in the clearest cases, without the direction of the court; and he recommends to their attention the words of Lord Harcourt in *Pye v. George* (2 P. Wms. 684.), that it would be a dangerous experiment for trustees, in any case to destroy remainders, which they were appointed by the settlement to preserve. Fearn. Cont. Rem. 493. And see Mr. Cox's note to *Basset v. Clapham*, 1 P. Wms. 358, and the late case of *Biscoe v. Perkins*, 1 Ves. & B. 485; in which the doctrine on the duties and liabilities of trustees to preserve contingent remainders was considered. "The cases," says Lord Eldon, C. "are uniform to this extent; that if trustees, before the first tenant in tail is of age, join in destroying the remainders, they are liable for a breach of trust; and so is every purchaser under them with notice: but when we come to the situation of trustees to preserve remainders, who have joined in a recovery after the first tenant in tail is of age, it is difficult to say more, than that no judge in equity has gone the length of holding, that he would punish them as for a breach of trust, even in a case, where they would not have been directed to join. The result is, that they seem to have laid down as the *safest* rule for trustees, but certainly most inconvenient for the general interests of mankind, that it is better for trustees never to destroy the remainders, even if the tenant in tail of age concurs, without the direction of the court." 1 Ves. & B. 491. It is further to be observed, that trustees to preserve contingent remainders are also bound to protect the inheritance, and to keep it as entire as possible; and as the inheritance consists of land, timber, mines, &c. all these are under their protection; and, in the execution of this trust, they are entitled to every assistance which a court of equity can afford them. And, where there is a limitation to trustees to preserve contingent remainders, the court of chancery will not permit a tenant for years to join with the person entitled to the inheritance for the time being, to cut down timber on the estate. *Garth v. Cotton*, 1 Dick. 183. 2 Cra. Dig. 402. And it is held, that trustees to preserve contingent remainders are guilty of a neglect of their duty, if they permit the tenant for life, liable to impeachment for waste, or a tenant *pur autre vie*, who by the nature of his estate is liable for waste, to destroy timber. *Stanfield v. Habbergham*, 10 Ves. 283. Neither ought trustees to preserve contingent remainders to permit a tenant for life or years, by the destruction of his estate, to bring forward a remainder to himself or another, for the purpose of cutting timber. *Garth v. Cotton*, supra. 3 Atk. 751. 1 Ves. 524. 546. *Stanfield v. Habbergham*, 10 Ves. 279. In the case of copyholds, the lord's estate will preserve contingent remainders, without any express nomination of trustees for that purpose, *Garth v. Cotton*, supra; but it seems doubtful, whether it is his duty to interpose actively, to prevent waste. 10 Ves. 282.

Before we quit this subject, it may be proper to observe, that a contingent remainder is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happen, *Weale v. Lower*, Pollexf. 54: though Mr. Fearn remarks, that some cases may arise, where the existence of the devisee of a contingent remainder, at some particular time, may, by implication, enter and make part of the contingency itself, upon which such interest is intended to take effect, in which case it cannot descend. Fearn. Cont. Rem. 534. *Moorhouse v. Wainhouse*, 1 Bl. Rep. 638. And although a contingent remainder cannot be passed or transferred by a conveyance at law, before the contingency happens, otherwise than by estoppel by fine, or by a common recovery, wherein the person entitled to the contingent estate comes in as vouchee, *Weale v. Lower*, supra. *Pick v. Edwards*, 3 P. Wms. 372. 1 Prest. Conv. 301; yet it seems that contingent estates are assignable in equity. Fearn. Cont. Rem. 537. And it is now settled, that where contingent remainders are descendable to the heirs of the persons entitled to them, they may be devised by will like any other estates. *Ibid.* *Selwin v. Selwin*, 2 Bl. Rep. 222. 251. 2 Burr. 1131. *Roe v. Jones*, 1 H. Bl. 30. *Moor v. Hawkins*, 3 T. R. 88. cited in 1 H. Bl. 33.

With respect to remainders, limited by way of use, and executory devises, see the notes to Chap. 43. Of Conveyances under the statute of Uses; and Chap. 46. Of Alienation by Devise. For some observations on the rule in *Shelley's case*, see n. (p) infra.—[Ed.]

(1) The idea of a reversion is founded on the principle, that where a person has not departed with his whole estate and interest in a piece of land, all that which he has not given

ton (sect. 19), tenant in fee-simple maketh gift in tail (M). So it is of a lease for life or for years. *If a man extend lands by force of a statute merchant, staple, recognizance, or *elegit*, he leaveth a reversion in the conusor. But since Littleton wrote, the description must be more large upon the statute of (f) 27 H. 8., for at this day, if a man seised of lands in fee make a feoffment in fee, and depart with his whole estate, and limit the use to his daughter for life, and after her decease, to the use of his son, in tail, and after to the use of the right heirs of the feoffor: in this case, albeit he departed with the whole fee-simple by the feoffment, and limited no use to himself, yet hath he a reversion (6) (N); (g) for whensoever the ancestor takes an estate for life, and after a limitation is made to his right heirs, the right heirs shall not be purchasers. And here in this case when the limitation is to his right heirs, and right heir he cannot have during his life (*non est hæres viventis*) the law doth create an use in him during his life, until the future use cometh *in esse*; and consequently the right heirs cannot be purchasers; and no diversity when the law creates the estate for life, and when the party. And all this was adjudged between (h) Fenwicke and Mitford, in the King's Bench: and if the limitation had been to the use of himself for life, and after to the use of another in tail, and after to the use of his own right heirs, the reversion of the fee had been in him, because the use of the fee continued over in him (7); and the statute doth execute the

162. 196. 197.
Cro. Cha. 400.)
Reversion re-
mains in the
feoffor, after
gift in tail,
&c.

(141)*
or after an
extent by
statute mer-
chant, &c.;
(f) 27 H. 8.
ca. 10. (Cro.
Cha. 24.
1 R. 1. Abr.
625. 1 Co.
104 b. 2 Co.
91. 2 Rol.
Abr. 417.
1 Leon. 182.)
or where an
use, after di-
vers particu-
lar estates, is
limited to the
feoffor's right
heirs;
(g) 36 E. 3. 26.
27 E. 3.
Page 118.
24 E. 3. 26.
40 E. 3.
(h) Tr. 31 EL.
inter Fen-
wicke & Mit-
ford. 32 H. 8.
Gard. 93.
28 H. 8.
Dyer 8, 9, 10,
&c. Buck-

(6) "Vid. 3 & 4 P. & M. Dy. 134. contra."—Hal. MSS. But see the case cited by Lord Hale in the next note, and also post, 12 b. and note 2. there.—[Hargr. n. 2. 23 b.]

(7) "*Cassus Com. Bedford*, M. 34 & 35 Eliz. Poph. n. 8. Feoffment to the use of the feoffor for forty years, remainder to B. in

tail, remainder to the right heirs of the feoffor. It is the old reversion, and the feoffor may devise it; for the use returned to the feoffor for want of consideration to retain it in the feoffee till the death of the feoffor." Hal. MSS.—See the *Earl of Bedford's case* in Poph. 3. Vid. 27 E. 3. 8. "4 H. 6. 20. 42 Ass. 2. 9 E. 3. 14. 10 E. 3. 48. Lands

away remains in him; and the possession of it reverts or returns to him, upon the determination of the preceding estates. If, therefore, a person, who is seised in fee, conveys an estate for life to A., remainder for life to B., remainder over to twenty other persons for life, he still retains the fee-simple of the lands in himself, because he has not departed with it; but as such fee-simple can only return or fall into possession upon the determination of the preceding estates, it is only an estate in reversion. So where a person, having only a particular estate in lands, grants a smaller estate than his own, he has a reversion left in himself. Thus, if tenant in tail grants an estate for life, he has a reversion in him; because he has not departed with the whole of his interest. In the same manner, where a person, who has an estate for ninety-nine years, grants an estate for ninety-eight years, or for any shorter term, he has a reversion left in him. 2 Cru. Dig. 454, 5, 6. 2 Bl. Com. 175. The possession of the lands is said to return to the grantor on the determination of the grant, for a present interest, though taking effect *in futuro*, remains, even during the existence of the grant, in the person making it; and this interest is what is called his reversion, or, more properly, his right of reverter. Watk. Convey. 59. 2 Bl. Com. 175. Plowd. 151.—[Ed.]

(M) Before the statute *de donis conditionalibus*, no reversion remained in the grantor or donor after he had created a conditional fee; because the grantee of such an estate was considered as having the absolute property of it, and the grantor had only a possibility of reverter. But, as soon as the statute *De donis* was made, the judges determined, that an estate given to a man and the heirs of his body, was only a particular estate; and, therefore, that there remained an estate in reversion in the grantor. Ant. 22 a, b. vol. 1. p. 526, 527. —[Ed.]

(N) See n. (E) ant. p. 128. and more fully in the notes to the Chapter of Uses. Post, Chap. 43.—[Ed.]

enham's
case. 5 Ma-
rie, Dyer 163.
(1 Rol. Abr.
323. Mo. 294.)

(142)*
or where a
man makes
a gift in tail,
remainder to
his right
heirs.
(6) 1 H. 5. 8.
4 H. 6. 20.
9 Eliz. Dyer.
Bromley's
case.

possession to the use in the same plight, quality, and degree, as the use was limited.

*(i) If a man make a gift in tail, or a lease for life, the remainder to his own right heirs, this remainder is void, and he hath the reversion in him (o), for the ancestor during his life beareth in his body (in judgment of law) all his heirs, and therefore it is truly said, that *heres est pars antecessoris*. And this appeareth in a common case, that if land be given to a man and his heirs, all his heirs are so totally in him, as he may give the lands to whom he will.

or to the
heirs male of
his body.
(k) Dyer 5.
Marie 156.
Groswood's
case adjudg-
ed. Bend-
lowes, Ser-
jeant, in his
report
agreeth.
(Rob. 30. 23.
1 Mod. 227.
1 Rol. Rep.
240.)

On feoffment
to use of fe-
offor in tail
and of feoffee
in fee, the fe-
offee has a
remainder,
and not a re-
version.
(l) 20 Eliz.
Dyer.

(143)*

(k) So it is, if a man be seised of lands in fee, and by indenture make a lease for life, the remainder to the heirs male of his own body, this is a void remainder; for the donor cannot make his own right heir a purchaser of an estate tail, without departing of the whole fee-simple out of him (8): as if a man make a feoffment in fee to the use of the heirs male of his body, this is a good estate tail executed in himself, and the limitation is good by way of use, because it is raised out of the state of the feoffees which the feoffor departed with, and that is apparent, for a limitation of use to himself had without question been good.

(l) If a man make a feoffment in fee to the use of himself in tail, and after to the use of the feoffee in fee, the *feoffee hath no reversion, but in nature of a remainder, albeit the feoffor have the estate tail executed in him by the statute, and the feoffee is in by the common law, which is worthy of observation.

granted by A. by fine for the life of A. remainder to A.'s right heirs. It is a reversion in A. and he may grant it." Hal. MSS. "Dy. 237. Fine to husband, as that which he and his wife have of his gift, which render to the consor for life, remainder to the right heirs of the husband. It is a void remainder, and the wife survivor shall have it for life." Hal. MSS.—[Hargr. n. 3. 22 b. (134).]

(8) "Where heir shall be purchaser, Vid. fol. 9. b. 11 H. 6. 13. Devise to B. for life, remainder to C. in tail, remainder to the next heir of the devisor and the heirs of his body, it is a purchase in the heir. *Quere* there if it had been heirs.—*Archer's case*, 1 Rep. 66 b. Devise or conveyance to A. for life, remain-

der to his next heir male, and to the heirs male of the body of such heir male, it is a purchase in the heir, because in the singular number, and the limitation is applied to it.—Vid. 1 Rep. 104. *Shellie's case*. Use limited for life to A. remainder to the heirs male of the body of A. and the heirs male of the body of such heirs male. It is a limitation, and A. has a tail executed. But if the ancestor takes estate for years, remainder limited to the heirs male of his body, it doth not vest in the ancestor. Accord. hic fol. 13. *Hodgkinson's case*." Hal. MSS.—"See *Hodgkinson's case* from Lord Hale's MSS. at the end of n. 6. post, 14 a."—[Hargr. n. 4. 22 b. (135).]

[See n. (r) infra.][Ed.]

(o) The right of reverter can only arise by the act of law, and cannot be created by the act of the party, though it is a consequence of his previous act. Therefore, where a person, as in the case put by Lord Coke, limits particular estates to strangers with the ultimate limitation to his own right heirs, or to himself in fee, the latter limitation shall not take effect as a remainder, or by reason of the express limitation of the grantor; but as the law would have given to him or his heirs, as a consequence of the preceding limitation, the same interest or estate as the express words would have conveyed, those words shall be deemed wholly nugatory, and the grantor or his heirs shall be in reversion, or of the old estate. Watk. Convey. 60. 2 Bl. Com. 175. Watk. Desc. 168. Et vid. *Doc*, d. *The Earl of Cholmondeley v. Masey*, 12 East, 599.—[Ed.]

To conclude this point, (*m*) whosoever is seised of land, hath not only the estate of the land in him, but the right to take profits, which is in nature of the use, and therefore when he makes a feoffment in fee without valuable consideration to divers particular uses, so much of the use as he disposeth not, is in him as his ancient use in point of reverter. As if a man be seised of two acres, the one holden by knight service by priority, and the other by knight-service holden by posteriority, and maketh a feoffment in fee of both acres to the use of himself and his heirs, the old use continues in him, and the priority and posteriority remain. So it is of lands of the part of the mother, the use shall go to the heir of the part of the mother, which could not be, if it were not the old use, but a thing newly created. The like law of lands of the custom of borough English, gavelkind, &c. (9).

23 a.
On feoffment to uses without consideration, the use undisposed of reverts to the feoffor, as his ancient use. (m) 13 H. 7. 6. 28 H. 8. Dyer 12. (3) Co. 81 b. Cro. Jam. 201. Post, 271 b.) 5 E. 4. 7. 1 Co. 71. 84. 55. 100, &c. Chudley. 2 Co. 56, 57. 58. 77, 78. 4 Co. 22. 6 Co. 34. 43.

By section 719, it appeareth, that (*n*) whensoever the ancestor taketh any estate of freehold, a limitation after in the same conveyance to any of his heirs, are words of limitation, and not of purchase, albeit in words it be limited by way of remainder (1) (r); and

376 b.

And where the ancestor takes an estate of freehold, a limitation after, in the same conveyance, to his heirs, vests in himself.

(n) 24 E. 3. 26. 27 E. 3. Age 108. 38 E. 3. 26. 40 E. 3. 9. 37 H. 8. Br. Noame 1 & 40. & tit. Done and Rem. 61. (Anto, 17 b. 22 b. 2 Bol. Abr. 417. 1 Bol. Abr. 627, 628.)

(9) See further on this subject the several books cited post, 12 b. in n. 2. to which add Prec. in Cha. 222. 319. and Plowd. 545. and note f. in the English translation of Plowden. It may be a useful hint to observe, that the English edition of Mr. Plowden's Commentaries, which most deservedly bear as high a

character as any book of Reports ever published in our law, has a great number of additional references and some notes; and that both of these are generally very pertinent, and show great industry and judgment in the editor.—[Hargr. n. 1. 23 a. (136).]

(1) See *Mr. Butler's* note at the end of the volume. Note IV.

(r) The rule mentioned in the text is usually called the rule in *Shelley's case*. As this rule is intimately connected with the doctrine contained in the present chapter, it may be desirable in this place to consider the manner in which it is applied in the construction.—1st. Of deeds; 2dly. Of surrenders of copyholds; and 3dly. Of devises.

1st. Of the application of the rule in *Shelley's case* in the construction of deeds. Where an estate was conveyed to A. for life, remainder to the heirs, or heirs of the body of A., if the construction had been made according to the strict meaning of the words, A. would have taken only an estate for life, and the remainder to the heirs, &c. of A. would have been considered as words of purchase, giving a contingent remainder to the heirs, &c. of A., according to the rule of law, that *nemo est hæres viventis*; but such a construction would have been attended with these inconveniences: 1st. The lord of the fee would have been deprived of the wardship and marriage of the heir, because, in that case, the heir would have taken as a purchaser, without claiming any thing from his ancestor by descent. 2dly. The remainder to the heirs, or heirs of the body, being contingent until the death of the tenant for life, the inheritance would have been in suspension or abeyance: which was never allowed but in cases of absolute necessity; because the abeyance of the inheritance created a suspension of various operations of law, particularly of the remedies for the recovery of lands by real actions. And 3dly. If the remainder, in those cases, had been construed to be contingent, no alienation could have taken place in the life-time of the ancestor. To obviate which inconveniences, was the origin of the rule of law, laid down in *Shelley's case*, viz. that "when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, that always, in such cases, 'the heirs' are words of limitation of the estate, and not words of purchase." 1 Co. 104 a. Whence it follows, that such remainder is immediately executed in possession, in the ancestor so taking the freehold, and is not contingent or in abeyance. Bl. Arg. Harg. Tracts, 498. 510. 4 Cru. Dig. 470, 1. Serjeant Rolle, indeed, takes a distinction respecting this rule, by saying,

- (144)* therefore (if land be given to a *man, and to the heirs male of his body begotten and for default of such issue, the remainder thereof
 (145)* to his heirs *female of his body begotten) here the remainder, to the

1 H. 6. 4. 11 H. 6. 13. 14. 28 H. 6. Devise 18. Stattham. Devise. Pl. Com. 414. 30 H. 6. 43.
 Vid. Litt. ca. Talle, sect. 24. 37 H. 8. Br. Done and Rem. 61. & tit. Noeme 1 & 40.
 (Ante, 25 a. b.) Vaugh. 368 g. 376. Post, 374 a.)

that where the freehold is so limited to the ancestor, and a mediate remainder to his right heirs, that all the intermediate estates between that and the limitation to his heirs, as well as his own estate, may determine during his life, in that case the limitation to his heirs is in abeyance, because he can have no heir to take the remainder. 2 Rol. Abr. 418. But Mr. Fearn has controverted this distinction, and shown that the possibility of the freehold's determining in the life-time of the ancestor, who takes it, does not prevent the subsequent limitation to his heirs from attaching in himself. Fearn. Cont. Rem. 32. Et vid. *Curtis v. Price*, 12 Ves. 89. With respect to the mode in which mediate limitations are vested, it is observable, that where the subsequent limitation is immediate, it then becomes executed in the ancestor, forming by its union with his particular freehold one estate of inheritance in possession: but where such limitation is mediate, it is then a remainder vested in the ancestor, who takes the freehold, not to be executed in possession, until the determination of the preceding mesne estates. Fearn. Cont. Rem. 38. And where the limitations intervening between the first estate for life, and the limitation to the heirs of the body, are contingent, the estate for life is not merged, because the intervening limitations would be thereby destroyed; but the two limitations are united and executed in the ancestor only, until such time as the intervening limitations become vested; and then open and become separated, in order to admit such intervening limitations as they arise. *Lewis Bowles's case*, 11 Co. 79. Fearn. Cont. Rem. 42.

With regard to joint and several limitations, Mr. Fearn observes, that where there is a joint limitation of the freehold to several, followed by a joint limitation of the inheritance in fee-simple to them; as an estate to A. and B. for their lives, or in tail, and afterwards to their heirs, so that both limitations are of the same quality, that is, both joint, it seems the fee vests in them jointly. Fearn. Cont. Rem. 40. Ante, vol. 1. p. 774. n. (N) And so if the limitation of the freehold be to baron and feme jointly, remainder to the heirs of their bodies, it is an estate tail executed in them; as they are capable of issue, to whom such joint inheritance can descend. Brook. Estate, p. 75. But if the limitation of the freehold be not joint but successive, as to one for life, remainder to the other for life, remainder to the heirs of their bodies; there it seems the ultimate limitation is not executed in possession, but gives them a joint remainder in tail. *Stephens v. Brettridge*, T. Raym. 36. 1 Lev. 36. And if the limitation of the inheritance be to several men, or to several women in tail, instead of fee-simple, though the freehold be to them jointly, they take several estates of inheritance; because they cannot have issue between or among them as a man and woman may. Ant. 182 b. vol. 1. p. 741, 2. And the same rule extends to other cases, where the relative situations of the grantees render the possibility of issue between or among them more remote than what is termed a simple or common possibility, or else is inconsistent with the laws of marriage. Fearn. Cont. Rem. 41. Ant. vol. 1. p. 517 n. (D). Where the particular estate is limited to A. with remainder to the heirs of A. and B. this is a contingent remainder, and not a vested estate. 2 T. R. 435. 2 Bl. Rep. 731. So if there be a limitation to the wife for life, remainder to the heirs of the body of the husband and wife, this is no remainder in the wife, for the freehold is limited to her alone; and as the person who is to take in remainder must be heir of both their bodies, if the wife should die before the husband, there can be no one to answer that description when the particular estate determines, because the baron cannot have an heir during his life, nor could it be involved or flow into the limitation to the feme herself, as not being confined to her own heirs; therefore the remainder is in contingency. 2 Rol. Abr. 417. Cases of the last mentioned class are distinguishable from those cases, where the limitation to the heirs is held to vest, notwithstanding the ancestor's freehold may determine in his life-time; for there the limitation is to the heirs of the body, of the ancestor only; but here it is to the heirs of the body, of the ancestor and of her baron; and though every person may so far be supposed to carry his own heirs in himself during his life, as that a limitation to them where he takes a preceding freehold may vest in himself, supra, 22 b.; yet no person can be supposed to include in himself the heirs of himself, and of somebody else. Fearn. Cont. Rem. 44, 45. But where the particular estate is granted to two persons, with a limitation to the heirs or heirs of the body of one of them, the inheritance is

heirs female, vesteth in the tenant in tail himself. And it is good (146)*
 *to be *known that, for learning sake, and to find out the reason of *377 a.
 the law, these limitations to the heirs male of *the body, and after (147)*

executed in the person to whose heirs it is limited. *Alpass v. Watkins*, 8 T. R. 516. Limitations of this kind are said to be executed *sub modo*, that is, to some purposes, though not to all; for though they are so far executed in, or blended with the possession, as not to be grantable away from, or without the freehold, by way of remainder; yet they are not so executed in possession as to sever the jointure, or entitle the wife of the person so taking the inheritance to dower. Ant. 184 a. vol. 1. p. 746; and see the books cited in n. (56) there.

The rule in *Shelley's case*, however, does not apply where the ancestor takes only an estate for years (another person being the grantor); for, in such case, a remainder to his heirs, or to the heirs of his body, will not vest in himself, but in such heirs, by purchase. Post, 319 b. *Sir C. Tippin's case*, cited 1 P. Wms. 359. Neither will it take place, unless the particular estate of freehold, and the remainder to the heir or heirs of the body, are created by the same conveyance. *Cranmer's case*, 2 Leon. 57. *Moor v. Parker*, 1 Ld. Raym. 37. 2 Vern. 486. *Doe v. Fonnereau*, Dougl. 487. 510. *Venables v. Morris*, 7 T. R. 342. Fearn. Cont. Rem. 99. But as an appointment in pursuance of a power, when executed, is to be considered as if it had been inserted in the original deed by which the power of appointment was created, 7 T. R. 347; it seems, that where there is a limitation to a person for life by one deed, and the estate is afterwards limited to the heirs of his body, under an execution of a power of appointment contained in that deed, in such case the several limitations will consolidate. Fearn. Cont. Rem. 102. Prest. Ess. on Rule in *Shelley's case*, 57. And it is immaterial, with respect to this rule, whether the ancestor takes the freehold by express limitation, or by implication arising from the deed in which the estate is limited to his heirs, &c.; in either case the subsequent limitation vests in himself. *Pybus v. Mitford*. 1 Ventr. 372.

It may be further observed, that the rule in question is only applied to limitations in which the word "heirs" is used, on account of the peculiar signification of that word, and the maxim that *nemo est hæres viventis*; so that if lands are limited to A. for life, remainder to his first and other sons and the heirs of their bodies; or remainder to the child and children of A., or to the issue of A. and the heirs of their bodies; no more than an estate for life will vest in A., and the words *son, child, or issue*, will operate as words of purchase. *Levis Bowles's case*, 1 F. Co. 30. And the rule does not extend to the word "heir" in the singular number, with words of limitation superadded. *Walker v. Snow*, Palm. 359. Nor where the estates are of different natures, as if the first limitation only gives a trust estate of freehold, and the subsequent limitation to the heirs of the body carries the legal estate. *Lord Say and Sele v. Jones*, 3 Bro. P. C. 113. Nor to cases of marriage articles; which being executory are construed according to the intention of the parties, whose chief object in such agreement, is to make a provision for the issue of the marriage; therefore where in marriage articles it is agreed to settle lands, to the use of the husband for life, with remainder to the heirs of his body, these last words are construed to be words of purchase, and to mean the first and other sons of the marriage, and the heirs of their bodies. 1 Bro. C. C. 222. *Trevor v. Trevor*, 1 P. Wms. 682. 1 Ab. Eq. 387. *Cusack v. Cusack*, 1 Bro. P. C. 470. And where articles and a settlement are made before marriage, and the settlement is made in pursuance of the articles, if the words "heirs of the body" are transcribed from the articles into the settlement, they will be altered in chancery, and the settlement will be rectified according to the intention of the articles, by making the husband only tenant for life, with remainders to the issue of the marriage. *West v. Erissey*, 2 P. Wms: 349. 3 Bro. P. C. 327. 1 Collect. Jur. 463. *Hart v. Middlehurst*, 3 Atk. 371. *Roberts v. Kingsley*, 1 Ves. 238. So if the settlement is made after the marriage, and adopts the words of the articles. *Streatfield v. Streatfield*, Forrest. 176. But this doctrine is adopted only in cases of marriage articles, and is not extended to limitations, in settlements, of the legal estate. *Alpass v. Watkins*, 8 T. R. 516. And, although where articles are entered into before marriage, and a settlement is made after marriage different from those articles, the court will set up the articles against the settlement; yet, where both the articles and settlement are previous to the marriage, at a time when all the parties are at liberty, and the settlement is not expressed to be made in pursuance of the marriage articles (as in the above cited case of *West* and *Erissey*) if such settlement differ from the articles, it will be considered as founded on a new agreement between them, and

to the heirs female of the body, may be put : but it is dangerous to (148)* use them in conveyances, for, "great inconveniences may arise there-

will control the articles. *Legg v. Goldwire*, Cas. Temp. Talb. 20. Fearn. Cont. Rem. 154. 4 Cru. Dig. 487.

The rule, in Shelley's case, has been adopted in the construction of assignments of terms for years ; and the words "heirs of the body" have been held to be words of limitation, *Peacock v. Spooner*, 2 Vern. 43. 195. *Webb v. Webb*, 1 P. Wms. 132. *Hayter v. Rod*, 1 P. Wms. 360. 2 Ves. 660. *Theobridge v. Kilburne*, 2 Ves. 233 : though the construction has been different where there were words of limitation superadded to the words "heirs of the body." *Archer's case*, 1 Co. 66. *Hodsol v. Bussey*, Forrest. MSS. S. C. 2 Atk. 89. Barnard. 199. *Price v. Price*, 2 Ves. 234. *Sands v. Dixwell*, 2 Ves. 659.

2dly. Of the application of the rule in Shelley's case, in the construction of surrenders of copyholds :—The rule under consideration is equally applied in construing surrenders of copyhold estates as in deeds ; and therefore where a person surrenders to the use of himself for life, remainder to another in tail, remainder to his own right heirs, there the heirs shall take by descent. Gilb. Ten. 270. Fearn. Cont. Rem. 79. *Allen v. Palmer*, 1 Leon. 101. *Roe v. Aistrop*, 2 Bl. Rep. 1228. And Mr. Fearnie observes, that where an estate for life is limited either to the father or mother only, and the subsequent limitation is to the heirs of both their bodies, the construction is the same in regard to copyholds as to freeholds ; viz. the subsequent limitation does not vest in the ancestor taking the estate for life, but is a contingent remainder to the heirs of the bodies of both father and mother. *Lane v. Pannel*, 1 Rol. Rep. 238. *Frogmorton v. Wharrey*, 2 Bl. Rep. 728. In *Lane v. Pannel*, Lord Coke took a distinction between a limitation upon a surrender by a copyholder in fee to his own heirs general where he takes a preceding estate of freehold himself, and the like limitation where he takes no preceding freehold estate ; a distinction which certainly has no place in respect of freehold lands ; for in freeholds, we have seen, where the estate moves from the grantor, the ultimate limitation to his heirs general, though the ancestor takes no preceding freehold, will be a reversion in him, and part of the old estate, and the heir will take it by descent ; but Lord Coke held, that where a person surrendered a copyhold to the use of himself for life, remainder to another in tail, remainder to the right heirs of the surrenderor, there the heirs should have it by descent ; but otherwise, where the surrenderor had not an estate for life or in tail limited to him ; for then his heir should enter as a purchaser, as if such use had been limited to the right heirs of a stranger. But Mr. Fearnie observes, that the only ground upon which he could account for Lord Coke's opinion, is, the supposition that an entire new estate was created and derived under the uses of the surrender, throughout the whole of them, and that no estate taken under those uses is any part of the whole estate. Fearn. Cont. Rem. 87 ; and this notion has been entirely exploded by modern decisions. See Gilb. Ten. 272. *Roe v. Griffiths*, 4 Burr. 1952. *Thrustout, d. Gower v. Cunningham*, 2 Bl. Rep. 1046. Fearn. Cont. Rem. 90.

3d. Of the application of the rule in construing devises :—The rule now under consideration having been established for purposes of general utility, it has been adopted in the construction of devises, as well as in that of deeds. But it being a principle of law, that the intention of the testator is to be the chief guide in construing wills ; it has been often doubted how far the application of this rule should be extended, in contradiction to the intention of the testator. Fearn. Cont. Rem. 290. 299. It has, however, been uniformly applied to devises of legal estates. *Rundale v. Eley*, Cart. 170 ; although it appeared from other circumstances, besides an express devise for life, that the testator did not intend to give the first devisee a greater estate ; such as a power to settle a jointure, with the concurrence of trustees ; or an interposed estate to trustees to preserve contingent remainders ; or a clause, that the devisee's estate should be without impeachment or waste. *Broughton v. Langley*, 2 Ld. Raym. 273. *Papillon v. Voice*, 2 P. Wms. 471. *Sayer v. Masterman*, Fearn. Cont. Rem. 250. Ambl. 344. *Blandford v. Applin*, 4 T. R. 82. *Candler v. Smith*, 7 T. R. 531. *Cock v. Cooper*, 1 East, 229. *Pearson v. Vickers*, 5 East, 548. *Poole v. Poole*, 3 Bos. & P. 627. Ant. vol. 1. p. 548. n. (N). So, although the limitation to the heirs be only mediate, yet the devisee will take an estate in fee or in tail, in remainder, to take effect in possession, upon the determination of the interposed estate : and the estate for life is not merged in the remainder. *Coulson v. Coulson*, 2 Atk. 247. *Hodgson v. Ambrose*, Dougl. 337. 3 Bro. P. C. 416. *Thong v. Bedford*, 1 Bro. C. C. 313. And the rule holds, although no estate for life is expressly devised, but arises by implication, *Hayes v. Ford*, 2 Bl. Rep. 698 ; and although the limitation be to the heir in the singular number. *Burley's case*, 1 Vent. 230. *Wilkins v. Whiting*, 1 Rol. Abr. 836. Bulstr. 219. 2 Vern.

upon ; for if such a tenant in tail hath issue divers sons, and they have issue *divers daughters, and likewise if tenant in tail hath issue divers (149)*

324. *Miller v. Seagrave*, Rob. Gav. 96. *Dubber v. Trollop*, Rob. Gav. 96. *Ambl. 453. Blackburn v. Stables*, 2 Ves. and B. 371. And a devise to the heirs, or heirs of the body, of a prior devisee for life, with superadded words of limitation, will be construed within the rule in Shelley's case, *Goodright v. Pullyn*, 2 Ld. Raym. 1437. 2 Stra. 729. *Legate v. Sewell*, 1 P. Wms. 87. *Morris v. Ward*, 8 T. R. 518. 2 Burr. 1102. *Denn, d. Webb v. Puckey*, 5 T. R. 299 ; though there are some cases (which will be mentioned hereafter) in which a different construction prevails. The rule in question has also been applied to devises of trust estates, the construction of which is the same in the court of chancery, as it would be in a court of common law upon a devise of legal estate. *Sweetapple v. Bindon*, 2 Vern. 536. *Fearn. Cont. Rem. 164. Bate v. Coleman*, 2 Vern. 670. 1 P. Wms. 142. *Garth v. Baldwin*, 2 Ves. 646. *Wright v. Pearson*, *Ambl. 358. Fearn. Cont. Rem. 187. Austen v. Taylor*, *Ambl. 376. Jones v. Morgan*, 1 Bro. C. C. 206. And it takes place also in devises of copyhold estates. *Lawsey v. Lowdall*, 2 Rol. Abr. 253. pl. 4. *Gilb. Ten. 270. Bushby v. Greenelate*, 1 Str. 445 ; and in devises of terms for years : though if there appears any other circumstance or clause in the will to show the intention of the testator, that the words "heirs of his body," should be words of purchase, and not of limitation, then it seems the ancestor takes for life only, and his heir will take by purchase. *Fearn. Ex. Dev. 300. 3 Cru. Dig. 344.*

The rule in Shelley's case, however, is not applied to devises, where the limitation is to sons or children, 1 Rol. Abr. 837. pl. 13. *Ginger v. White*, *Willes, 349. Goodtitle v. Woodhall*, *Willes, 592. Goodright v. Dunham*, *Dougl. 264* ; or where words of explanation are added to the word "heirs," from whence it may be collected that the testator meant to qualify the meaning of the word "heirs," and not to use it in its technical sense, but as a description of the person to whom he intended to give his estate after the death of the first devisee. As where a person devised to his son B. I. and his heirs lawfully to be begotten ; that is to say, to his first, second, third, and every son and sons lawfully to be begotten of the said B. I. and the heirs of the body of such first, second, third, and every son and sons successively, lawfully issuing ; and in default of such issue, then to his right heirs for ever. It was resolved, that B. I. took only an estate for life ; the word "heirs" being fully explained by the subsequent words to be a word of purchase. *Lowe v. Davies*, 2 Ld. Raym. 1561. Et vid. *Doc v. Laming*, 2 Burr. 1100. 1 Bl. Rep. 265. *Rob. Gav. 95. Goodtitle v. Herring*, 1 East, 264. Sed vid. *Poole v. Poole*, 3 Bos. & P. 620. And where words of limitation are superadded to the word "heir," in the singular number, from which it appears to have been the testator's intention to denote by the word "heir," a new stock and root of inheritance ; or where the context shows that that word is not used in its technical sense ; as the word "issue," or "without impeachment of waste ;" a limitation to trustees to preserve contingent remainders ; or a direction so to frame the limitation, that the first taker shall not have the power of barring the entail, in these cases, it will be construed a word of purchase : and the first devisee will take an estate for life only. *Archer's case*, 1 Co. 66 b. *Clarke v. Day*, *Moor, 593. Blackburn v. Stables*, 2 Ves. & B. 371. And Mr. Fearn observes, that there may possibly be some cases, where the superadded words of limitation may be admitted to control the preceding words, heirs, heirs male, &c. though in the plural number ; when such superadded words limit an estate to such heirs, heirs male, &c. of a different nature, from that, which the ancestor would take, if the preceding words, "heirs male," &c. in those cases, were taken as words of limitation. As in the case put by Anderson (1 Co. 95 b. et vid. 1 Atk. 413.) of a limitation to the use of a man for life, and after his decease to the use of his heirs, and the heirs female of their bodies : here the first word "heirs" would have given a fee to the ancestor, if taken as a word of limitation ; whereas the subsequent words, "and the heirs female of their bodies," grafted on the word "heirs," could give only an estate tail female to the heirs. In such cases, the general effect of the first words, "heirs of the body," &c. seems to be altered, abridged, and qualified, by such subsequent express words of limitation annexed to them, as cannot possibly be satisfied by considering the first words as words of limitation. But we must take care to confine this observation to those cases, where the ingrafted words describe an estate descendible in a different course, and to different persons as special heirs, from what the first would carry the estate to ; viz. to males instead of females, or *vice versa* ; for where the first words give an estate tail general, and the words ingrafted thereon are words serving to limit the fee, it seems by the general and better opinion, that the annexed words of limitation are not to be attended to, as in the cases of *Goodright v. Pullyn*, (2 Ld. Raym. 1437.) *Wright v. Pear-*

- (150)* daughters, and each of them hath issue sons, none *of the daughters of the sons, nor the sons of the daughters, shall ever inherit to either

son (Fearn. Cont. Rem. 187. Ambl. 358.), and *King v. Burchall* (Ambl. 378.), where the ingrafted words limited the whole fee. Fearn. Cont. Rem. 286. So the rule is not applied to devises, where the remainder is given to the heir of the first devisee, for life only; in which case the first devisee will take no more than an estate for life. *White v. Collins*, Com. Rep. 289. And where the word "issue" is used with words of limitation superadded, it will be construed to be a word of purchase. *Loddington v. Kyme*, 1 Ld. Raym. 203. *Backhouse v. Wells*, 10 Mod. 181. And see *Doe v. Collins*, 4 T. R. 294. adj. acc. in which case Lord Kenyon observed, that, in a will, issue was either a word of purchase or of limitation, as would best answer the intention of the devisor; though, in the case of a deed, "issue" was universally taken as a word of purchase. Et vid. *Doe v. Burnall*, 6 T. R. 30. But the word "issue," in a will, will not be construed to be a word of purchase, where the general intent requires a different construction. See *King v. Melling*, 1 Vent. 235. 232. 2 Lev. 58. 2 P. Wms. 472. *King v. Burchall*, 4 T. R. 296. n. *Roe, d. Dobson v. Grew*, Wilm. 272. 2 Wils. 322. In cases where the testator has directed a settlement to be made, and the court of chancery has been called upon to give directions respecting such settlement, the court has deviated from the rule in Shelley's case, and has so far departed from that which would be the legal operation of the words limiting the trust, if reduced to a common law conveyance as to construe the words "heirs of the body," although preceded by a limitation for life, as words of purchase, and not of limitation. But this has been done only in cases, where it appeared from some clause or circumstance essentially repugnant to the nature of an estate tail, that the devisor could only intend to give the first devisee an estate for life; and that he used the words "heirs of the body," for the purpose of describing the persons, to whom he meant to give the estate, after the death of the first devisee. *Leonard v. Earl of Sussex*, 2 Vern. 526. *Stamford, (Earl of) v. Hobart*, 3 Bro. P. C. 31. *Papillon v. Poice*, 2 P. Wms. 471. *Ashton v. Ashton*, 1 Collect. Jur. 402. *Glenarchy v. Bosville*, Forrest. 3. 1 Collect. Jur. 405. *Meure v. Meure*, 2 Atk. 265. And see the case of *White v. Carter*, Ambl. 670. adj. acc. in which Lord Camden took a distinction between the case, where a testator has given complete directions for settling his estate, with perfect limitations, and where his directions are incomplete, and are rather minutes or instructions, and cannot be performed in the words of the will. In the former case, said his Lordship, the legal expression shall have the legal effect, though perhaps contrary to his intention; as in *Garth v. Baldwin*, 2 Ves. 646. In the latter case, the court will consider the intention, and direct the conveyance according to it. And where there is a settlement without articles, the words will be left to their legal operation, unless from some recital in the deed, or some other circumstance, it clearly appears that the language of the limitation was owing to mistake. Butl. Fearn. Cont. Rem. 114. Ch. Ca. 27. *Doran v. Ross*, 1 Ves. jun. 57. Lastly, where the estate devised to the ancestor, is merely an equitable or trust estate, and that to his heirs, or the heirs of his body, carries the legal estate, they will not incorporate into an estate of inheritance in the ancestor; as would have been the case, if both had been of one quality, that is, both legal, or both equitable. Fearn. Cont. Rem. 68. For where the limitations are both legal, the estate-tail arises by legal construction or a rule of law; and when the limitations are both equitable (without other ingredients in the case to control the construction), a similar rule is adopted by equity, to preserve an uniformity in construction. But when both the estates are not legal, the application of a legal construction or operation of a rule of law, which must equally affect both, seems to be excluded, by one of the objects of that construction not being a subject of legal cognizance. So when both are not equitable estates, their combination seems to be out of the reach of an equitable construction, to which one of the estates is not adapted. Idem, 78. Et vid. *Lord Say and Sele v. Jones*, 3 Bro. P. C. 113. 8 Vin. Abr. 262. *Shapland v. Smith*, 1 Bro. C. C. 75. *Silvester v. Wilson*, 2 T. R. 444. *Venables v. Morris*, 7 T. R. 342. 438.

Thus stood the law with respect to the rule in Shelley's case, when the famous case of *Perrin v. Blake* arose, before the court of king's bench, in the year 1769; a case which, how much soever it has been regretted as having for a time unsettled the law with regard to this celebrated rule, yet has, in the end, been productive of the most important benefits to the profession, by having given rise to the admired essay, from which the preceding observations have been chiefly extracted. The case was this:—One W. Williams seized in fee of a plantation in Jamaica, devised in the following words:—"Should my wife be *ascendit* with child, at any time hereafter, and it be a female, I give and bequeath unto her

of the said estates tail: *and so it is of the issues of the issues, for (151)* that (as hath been said) the issues inheritable must make their claim

the sum of 2000*l.* &c.; and, if it be a male, I give and bequeath my estate real and personal equally to be divided between the said infant and my son John Williams, when the said infant shall attain the age of twenty-one. Item, It is my intent and meaning, that none of my children should sell or dispose of my estate for longer time than his life; and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son John Williams and the said infant, for and during the term of their natural lives, the remainder to my brother-in-law J. G. and his heirs, for and during the lives of my son John Williams and the said infant, the remainder to the heirs of the body of my said sons John Williams and the said infant lawfully begotten, or to be begotten, the remainder to my daughters, &c." *Perrin v. Blake*, 4 Burr. 2579. 1 Bl. Rep. 672. Dougl. 329. 1 Hargr. Law Tracts, 490. No other son was born; and the question was, what estate John Williams took under this will? Had this been the case of an *executory trust*, says Mr. Fearn, the court of chancery might possibly have construed it an estate for life in J. W., upon the clause expressing the testator's will, that his sons should not convey a greater interest than for their lives. But as it was the limitation of a legal and not a trust estate, the court of chancery itself (in conformity to its own established distinctions explained in the above mentioned cases of *Leonard v. Earl of Sussex*, 2 Vern. 526. *Glenorchy v. Bosville*, Cas. Temp. Talb. 19. *Bagshaw v. Spencer*, 2 Atk. 581. 1 Ves. 149.), we may suppose, would have decreed it an estate-tail in J. W. The court of king's bench, however, in the case of *Perrin v. Blake*, treated those distinctions as too refined; and adjudged, that J. W. took only an estate for life, under the devise in question. A writ of error was brought upon this judgment in the exchequer chamber; in which the judgment was reversed by the opinion of seven judges against one; so that, upon the whole, eight judges were of opinion that John Williams took an estate-tail; and four, that he took only an estate for life. An appeal was brought to the house of lords from the judgment of reversal in the exchequer chamber; but the parties at length compromised the dispute.

The subsequent cases of *Hayes v. Foorde*, 2 Bl. Rep. 698. *Hodgson & Ux v. Ambrose*, Dougl. 337. 3 Bro. P. C. 416. *Jones v. Morgan*, 1 Bro. C. C. 218, 219. *Thong v. Bedford*, 1 Bro. C. C. 313, and the recent decisions above cited under their respective heads, have again restored the doctrine respecting this celebrated rule to its former authority. And it is now finally settled, that "neither an intent manifested by the testator to give only an estate for life, nor the interposition of trustees to preserve contingent remainders, nor mere words of condition, describing the order of succession in which the devisees are to take place, nor the introduction of powers of jointuring, or of liberty to commit waste, are of themselves sufficient to vary the technical sense of the words used. It must plainly appear that the testator did not mean to give such an estate as would pass under the words used, unless controlled by such apparent intent." *Per* Lord Alvanley, *C. J. Poole v. Poole*, 3 Bos. & P. 620. 627. In order to ascertain the testator's presumable intention, in his use of the words, heirs, &c. we cannot refer the student to a better medium than the principles laid down by Mr. Hargrave, in his masterly observations on the rule in Shelley's case. That profound writer observes, that when it is once settled, that the donor or testator has used words of inheritance according to their legal import; has implied them intentionally to comprise the whole line of heirs to the tenant for life; and has really made him the terminus or ancestor, by reference to whom the succession is to be regulated; then it will appear, that being considered according to those rules of policy from which it originated, it is perfectly immaterial whether the testator meant to avoid the rule or not; and that to apply it, and to declare the words of inheritance to be words of limitation, vesting an inheritance in the tenant for life as the ancestor and terminus to the heirs, is a mere matter of course. That on the other hand, if it be decided, that the testator or donor did not mean by the words of inheritance after the estate for life, to use such words in their full and proper sense; nor to involve the whole line of heirs to the tenant for life, and include the whole of his inheritable blood, and make him the ancestor or terminus for the heirs; but intended to use the word heirs in a limited, restrictive, and untechnical sense, and to point at such individual person, as should be the heir, &c. of the tenant for life at his decease; and to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the groundwork for a succession of heirs; and constitute him or her the ancestor terminus and stock for the succession to take its course from; in every one of these cases the premises are wanting, upon which only the rule in Shelley's case interposes its authority, and that rule becomes quite extraneous matter. The previous inquiry, therefore, will be, whether,

either only by males, or only by females, so as the females of the males, or males of the females, are wholly excluded to be inheritable to either of the said estates tail : but where the first limitation is to the heirs male, let the limitation be, for default of such issue, to the heirs of the body of the donee, and then all the issues, be they females of males, or males of females, are inheritable.

If a man give lands to a man, to have and to hold to him and the heirs male of his body, and to him and the heirs female of his body, the estate to the heirs female is in remainder, and the daughters shall not inherit any part, so long as there is issue male ; for the estate to the heirs male is first limited, and shall be first served ; and it is as much to say, and after to the heirs female, and males in construction of law are to be preferred.

*183 b.
Reversion.
why said to
be expectant
on the parti-
cular estate.

The law termeth a reversion to be expectant upon the particular estate, because the donor or lessor, or their heirs, after every determination of any particular estate, doth expect, or look for, to enjoy the lands or tenements again (q).

(152)*
143 a.
Incidents to
a reversion.

*And it is to be understood, that in the case of a gift in tail, lease for life or years, fealty is an incident inseparable to the reversion, so as the donor or lessor cannot grant the reversion over, and save to himself the fealty, or such like service.

But the rent he may except ; because the rent, although it be incident to the reversion, yet it is not inseparably incident. If a man maketh a gift in tail without any reservation, the donee shall hold

by a remainder to the heirs, either general or special, of a preceding tenant for life, it is the meaning of the instrument to include the whole of his inheritable blood, the whole line of his heirs ; or to design only certain individual persons answering to the description of heirs at his death. If the former is the sense, the rule always applies ; and, by vesting the remainder in the tenant for life, forces it to operate by limitation, even though the instrument should contradictorily and inconsistently add in express terms, that the remainder shall operate as a contingent one, and enure so as to make the heirs purchasers. If the latter sense is adopted, the rule is as invariably foreign to the case ; and the remainder consequently is contingent till the death of the tenant for life, upon which event his heir takes it by purchase. 1 Hargr. Law Tracts, 575. 577. This idea of the rule, which will be ever admired for its simplicity and clearness, has been confirmed by Lord Thurlow, in his determination in the case of *Jones v. Morgan*, 1 Bro. C. C. 220, and by Mr. Fearn, in his elaborate Essay on Contingent Remainders.—[Ed.]

(q) Reversions are vested interests ; for a person entitled to an estate in reversion, has an immediate fixed right of future enjoyment, that is, an estate vested *in presenti*, though it is only to take effect in possession, and profit *in futuro* ; and which may be aliened and charged much in the same manner as an estate in possession. 2 Bl. Com. 175. And the law is as careful of the rights of the reversioner, as of those of the tenant in possession ; and will, therefore, allow an action to be brought by the reversioner, as well as by the tenant in possession, for an injury done to the inheritance. *Jesser v. Gifford*, 4 Burr. 2141. 2 Cru. Dig. 458. And in order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealment of their death, it is enacted by statute 6 Ann. c. 18, that all persons on whose lives any lands or tenements are holden, shall (upon application to the court of chancery and order made thereupon) once in every year, if required, be produced to the court or its commissioners ; or upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements till the party shall appear to be living. 2 Bl. Com. 177.—[Ed.]

of the donor by the same services that he held over. (o) But otherwise it is of an estate for life or years; for there, if he reserveth nothing he shall have fealty only, which is an incident inseparable to the reversion, as hath been said (a).

(o) Litt. fol. 4.
Old Tenures,
5. 26 E. 2. 7.
38 H. 6. 7.

CHAPTER XXIX.

OF THE TITLE TO THINGS REAL BY DESCENT. (A)

RIGHT, *jus, sive rectum* (which Littleton often useth), signifieth properly, and specially in writs and pleadings, when an estate is

(153) *
345 a.
Definition of
right.
(Pl. 494.)

(a) Ant. 143. a. n. (x), vol. 1. p. 445. Reversions after estates for years are present assets; and the heir cannot plead a term of years raised by his ancestor in delay of execution, but should confess assets. *Smith v. Angell*, 1 Salk. 354. 2 Ld. Raym. 783. 7 Mod. 40. *Osbaston v. Stanhope*, 2 Mod. 50. *Villers v. Handley*, 2 Wills. 49. A reversion after an estate for life is *quasi* assets, and ought to be pleaded specially by the heir; and, in such case, the plaintiff may take judgment of it, *quando acciderit*. Carth. 129. Dyer, 373. b. *Rook v. Clealand*, 1 Ld. Raym. 53. Lutw. 5. 3. And though it is laid down as a general rule, that a reversion after an estate tail is not assets, because it is in the power of the tenant in tail to bar it at his pleasure, 1 Roll. Abr. 269. (A) pl. 2 *Mildmay's case*, 6 Co. 42. *Brediman's case*, Ibid. 58; yet when a reversion of this kind vests in possession, it then becomes assets. *Kellow v. Rowden*, 3 Mod. 253. And in such case, it will be assets for payment of debts, though it should be devised away; for such a devise is, by stat. 3 W. & M. c. 14, fraudulent and void against creditors. *Kinaston v. Clarke*, 2 Atk. 204.

It seems, however, that, notwithstanding the case of *Smith v. Parker*, 2 Bl. Rep. 1230, to the contrary, a reversion is not assets for payment of the specialty debts of any person, but the ancestor from whom the lands immediately descend. See 2 Saund. 8 f. n. 4. 2 Cru. Dig. 462. Post. 11 b. n. (3). *Doe v. Hutton*, 3 Bos. & P. 643. 648. 651. But a reversion is, when it vests in possession, liable to the judgments, statutes, or recognizances, of all those who were at any time entitled to it; because these securities attach on all the estates of the debtor. *Giffard v. Barber*, 4 Vin. Abr. 452. S. C. cited in *Cunningham v. Moody*, 1 Ves. 174; and the same principle extends to leases for years. *Symonds v. Cudmorte*, 4 Mod. 1. *Shelburne v. Biddulph*, 6 Bro. P. C. 356.

It remains to be observed, that all particular estates merge in the reversion whenever the same person becomes entitled to both; except an estate tail. 2 Rep. 61. 8 Rep. 74. 2 Bl. Com. 177, 178. And even that estate, when the right of the issue under the intail ceases, or is defeated or suspended, may become merged, and consequently let the reversion into possession. 3 Prest. Conv. 263.—[Ed.]

(A) The foregoing chapters of this book having been principally employed in defining the nature of real property, in describing the tenures by which it may be held, and in distinguishing the several kinds of estates that may be had therein; we now come to consider the title to real property, with the manner in which it may be acquired or lost.

According to Lord Coke's definition, *titulus est justa causa possidendi id quod nostrum est*; a title is the means whereby the owner of lands has the just possession of his property. 345 b. infra. But Sir William Blackstone observes, there are several stages or degrees requisite to form a complete title to lands and tenements. The first degree of title is the bare *possession*, or actual occupation of the estate, without any apparent right, or any pretence of right to hold and continue such possession. This may happen when one man disseises another; or where after the death of the ancestor, and before the entry of the heir, a stranger abates, and holds out the heir. In these cases, the disseisor or abator has only a mere naked possession, which the rightful owner may put an end to, by an entry on the land; but in the mean time, till some act be done by the rightful owner to divest this possession, and assert his title, such actual possession is *prima facie* evidence of the legal title in the possessor; and it may, by length of time, and negligence of him who has the right, by degrees ripen into a perfect and indefeasible title; and at all events, without such

(154)* turned to a right, as by discontinuance, disseisin, *&c. where it shall be said, *quòd jus descendit et non terra* (B). But right doth also include the *estate *in esse* in conveyances; and therefore if tenant in fee-simple make a lease for years, and release all his right in the land to the lessee and his heirs, the whole estate in fee-simple passeth.

20 H. 6. 9.
*345 b.
Vid. sect. 463.
Pl. Com. 481.
Lib. 8. fol. 153.
Altham's
case. 20 H.
6. 33.

actual possession, no title can be completely good. The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the actual possession is in another. Thus, in the case of disseisin or abatement, the right of possession is in the disseisee or heir, who may exert it, whenever he thinks proper, by an entry. And the actual possession is in the disseisor or abator. But this right of possession is of two sorts: an *apparent* right of possession which may be defeated by proving a better; and an *actual* right of possession, which will stand the test against all opponents. Thus, if the disseisor or other wrong-doer dies possessed of the land whereof he so became seised by his own unlawful act, and the same descends to his heir; now, by the common law, the heir has obtained an *apparent* right, though the *actual* right of possession resides in the person disseised; and it shall not be lawful for the person disseised to divest this *apparent* right by mere entry or other act of his own, but only by an action at law; for, until the contrary be proved by legal demonstration, the law will rather presume the right to reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his favour. 2 Bl. Com. 195—7. Gilb. Ten. 21. But if he, who has the *actual* right of possession, puts in his claim and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession to which he has such *actual* right. Yet if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an *actual* right of possession. And by this, the party kept out of possession may have nothing left in him, but the mere *right of property*, or *jus proprietatis*, without either possession or even the right of possession; and this estate is said to be divested and turned to a right. 2 Bl. Com. 197. It is divested because the rightful owner is turned out of possession; and it is turned to a right, because the right of possession, and consequently the right of entry, is lost, and nothing left but the *jus merum*, or mere right of property, which cannot be regained by a possessory, but only by a real action. 3 Cru. Dig. 370. Thus if a disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession* and *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent* right of possession; but I still retain the *actual* right both of possession and property. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the *actual* right of possession, and I retain nothing but the *mere right of property*. And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of sixty years. So also if the father be tenant in tail, and discontinues his estate-tail by alienating the lands to a stranger in fee, the alienee thereby gains the *right of possession*, and the son has only the *mere right*, or *right of property*. And hence it will follow, that one man may have the *possession*, another the *right of possession*, and a third the *right of property*. For if tenant in tail enfeoffs A. in fee-simple, and dies, and B. disseises A.; now B. will have the *possession*, A. the *right of possession*, and the issue in tail the *right of property*. A. may recover the possession against B.; and afterwards the issue in tail may evict A., and unite in himself the possession, the right of possession, and also the right of property. In which union consists a complete title to lands, tenements and hereditaments: for it is an ancient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property, which right is then denominated a double right, *jus duplicatum* or *droit droit*. Infra, 266 a. And when to this double right the actual possession is also united, when there is, according to the expression of Fleta, *juris et seisinæ conjunctio*, then and then only is the title completely legal. 2 Bl. Com. 299. Infra, 266 a.—[Ed.]

(B) A right is not grantable over, *Lampert's case*, 10 Co. 46 b.; neither can it be surrendered, post, 338 a.; nor will it pass to a stranger by fine, Sheph. Touch. 14. *Buckler's case*, 2 Co. 55, 56; though by such fine the right would be barred, as the cognizor cannot claim a right against his own fine, which is a matter of record, and by consequence an estoppel; as by that fine he has acknowledged the right to be in another. A right also is not devisable; but it may be extinguished; and the proper mode of extinguishment, is that of a release, or fine *sur cognizance de droit tantum*, to the person in actual possession of the lands. Watk. Convey. 64, 65.—[Ed.]

And so commonly in fines, the right of the land includeth and passeth the state of the land; as *A. cognovit tenementa prædicta esse jus ipsius B. &c.* and the statute (a) saith, *jus suum defendere*, which is *statum suum*. And note that there is, *jus recuperandi*, *jus intrandi*, *jus habendi*, *jus retinendi*, *jus percipiendi*, *jus possidendi*. (1 Cro. 429.)

Title, properly, (as some say) is, when a man hath a lawful cause of entry into lands whereof another is seised, for the which he can have no action; as title of condition, title of mortmain, &c. But legally this word (Title), includeth a right also, as you shall perceive in many places in Littleton; and title is the more general word; for every right is a title, *but every title is not such a right for which an action lieth; and therefore *Titulus est justa causa possidendi quod nostrum est*, and signifieth the means whereby a man cometh to land, as his title is by fine, or by feoffment, &c. And when the plaintiff in assise maketh himself a title, the tenant may say, *Veniat assisa super titulum*; which is as much to say, as upon the title which the plaintiff hath made by that particular conveyance. *Et dicitur titulus à tuendo*, because by it he holdeth and defendeth his land; and as by a release of a right a title is released, so by release of a title a right is released also. See more hereof in Fitzherbert and Brookes's Abridgments, in the title of Title. title,
Vid. sect. 429.
659, &c.
(Post, 347 b.)
(155)*
6 H. 7. 8 a.
Altham's
case, ubi su-
pra.

An interest, *Interesse*, is vulgarly taken for a term or chattel real, and more particularly for a future term: in which case it is said in pleading, that he is possessed *de interesse termini*. But *ex vi termini*, in legal understanding, it extendeth to estates, rights, and titles, that a man hath, of, in, to, or out of lands; for he is truly said to have an interest in them: and by the grant of *totum interesse suum* in such lands, as well reversions as possessions in fee-simple shall pass. And all these words singularly spoken are *nomina collectiva*; for by the grant of *totum statum suum* in lands, all his estates therein pass. *Et sic de cæteris*. and interest.
Pl. Com. fol.
374. in Scig-
nior Zonche's
case; and fol.
487 & 488, in
Nichol's
case.
23 H. 8. Taille
Br. 32. 35 H.
8. Grant.
Br. 180. Vid.
16 El. Dyer,
225 b. Titu-
lum.

Tenant for life, the remainder in tail, the remainder to the right heirs of tenant for life, tenant for life grant *totum statum suum* to a man and his heirs, both estates do pass. 345 a.
44 Ass. 28.
44 E. 3. 10.

For the better understanding of transferring of naked rights to lands or tenements, either by release, feoffment, or otherwise, it is to be known, that there is *jus proprietatis*, a right of ownership *jus possessionis*, a right of seisin or possession, and *jus proprietatis et possessionis*, a right both of property and possession: and this is anciently called *jus duplicatum*, or *droit droit*. For example, if a man be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis* (A); and if the dissei- 266 a.
Right of pro-
perty and
right of pos-
session dis-
tinguished.
Mirror, cap.
2. s. 17. Bract.
lib. 2. fol. 32.
Britton, fol.
99. 121. Bract.
lib. 5. fol. 372.
Union of
right of pro-
perty and

(A) But according to Sir William Blackstone, the disseisin gives to the disseisor no more than an actual possession, and leaves the jus possessionis in the disseisee. See Black. Com. vol. 2. p. 195. Archbold's Ed.—However, Lord Coke perhaps only meant to say, that the disseisor hath jus possessionis against strangers only. For though a stranger in the name, and to the

right of possession, a complete title.

see release to the disseisor, he hath *jus proprietatis et possessionis* (1).

(156)*

13 b.

Of descent.
(Post, 237.)

*Descent, (D), *descensus*, cometh of the Latin word *descendo*; and, in the legal sense, it signifieth, when lands do by right of blood fall unto any after the death of his ancestors: or a descent is a means whereby one doth derive him title to certain lands, as heir to some of his ancestors. And of this, and of that which hath been spoken, doth arise another division of estates in fee-simple, viz. every man, that hath a lawful estate in fee-simple, hath it either by descent, or by purchase.

237 a.

Nature of descent—

Mirr. cap. 2.
sect. 5. Bract.
lib. 5. fol. 370

& 431. Brit.
15. 215.

Vid. sect. 5.
(Sd. 498.)

Ante, 13 b.

Ante, 163.)

*237 b.

How it differs
from descent
in the civil
law.

(157)*

“*Descents.*” This word cometh of the Latin word *descendere, id est, loco superiore in inferiorem movere*; and in legal understanding it is taken when land, &c. after the death of the ancestor is cast by course of law upon the heir, which the law calleth a descent. And this is the noblest and worthiest means whereby lands are derived from one to another, because it is wrought and vested by the act of law, and right of *blood, unto the worthiest and next of the blood and kindred of the ancestor; and therefore it hath not in the common law altogether the same signification that it hath in the civil law; for the civilians call him, *heredem, qui ex testamento succedit in universum jus testatoris* (E). But by the common law he is only heir which succeedeth by right of *blood. And this

use of the disseisee may enter into the lands, and thereby repeat the same in the disseisee, even without the knowledge or agreement of the latter (see 258 a.); yet a stranger may not, in this case, enter in his own name, and to his own use. [Note from 18th Lond. Edit. 1823.]

(1) These may be subdivided, with respect to the disseisor, into that bare, naked possession, which he acquires by the disseisin, and the estate by title which his heir acquires by the descent; and with respect to the disseisee, into that right of possession which he can restore by entry, and the bare right which he can only recover by action. [Butler, Note 216.]

(D) The methods of acquiring a title to real property, according to the usual, though not strictly accurate, mode of division, are two only; by *descent* and *purchase*. 2 Bl. Com. 201. 244. 5. Watk. Desc. c. 1. Post, 18 b. n. (2), (106.) The former is where the title is vested in a person by the single operation of law; the latter, where the title is vested by the person's own act and agreement. Post, 18 a. b. Descent, or hereditary succession, is the title whereby a man, on the death of his ancestor, acquires his estate, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending on the heir is called *the inheritance*.—[Ed.]

(E) By the civil law, the heir is defined to be, he who is universal successor to all the goods, and all the rights of the deceased, and who is bound to acquit all the charges and burdens of the said goods. 1 Domat. b. 1. t. 1. s. 1. p. 558. And this definition embraced the two sorts of heirs known to that law, viz. those who were instituted, or named by a testament, called *testamentary heirs*; and those to whom the law gave the inheritance on account of their proximity in blood, who were called, for that reason, *heirs at law*. And the latter were also called heirs to intestates, because they succeeded, if they were not excluded by a testament. Ibid. But the law of England makes a distinction between these two sorts of heirs, and gives them different names. For the heir, in the legal understanding of the common law, is he to whom lands, tenements, or hereditaments, by the act of God, and right of blood, do descend of some estate of inheritance. And by the common law a man cannot be heir to goods or chattels. For, as to these, the person who succeeds to them is called in the law, executor, if he succeeds by the appointment of the deceased in his last will and testament; or administrator, if he succeeds by the appointment of the ordinary, in the case of one dying intestate. Post, 7 b. 8 a. Terms of the law verb. Executor, and Administrator.—[Ed.]

*Adignati, quasi
Nec cognati.*

Adignati ex Parte Patris.
(counts on the part of the Father, the
more worthy in Descent the further removed.)

Approved by
Brace, hb. 2, cap. 31, fol. 67.
Britton, cap. 89, fol. 220, 221.
Etela, hb. 5, cap. 7.
Mirror, cap. 1, 3, 5, 8, que Barriages.

Cognati ex Parte Matris.
(counts on the part of the Mother, the less
worthy in Descent the nearer of Kin.)

*Cognati, quasi
sunt, non ex
parte matris.*

Gradus Parentelæ & Confan'unitatis. **pro meliori intelligentiâ Authoris nostri.** **The Degrees of Barriage & of Consanguinity:** **for the better understanding of our Author.**

Lineæ transversales seu collateralis.
The side Line.

Abpatrius magnus.
The Great Uncle's Grand-father.
on the Father's side.

Abavia magna.
The Great Uncle's Grand-mother.

Triavius. 6 **Triavia.**
The Great Grand-father's
Great Grand-father.
The Great Grand-mother's
Great Grand-mother.

Abnepos collat.
The collateral Nephew.
Nepos collat.
The collateral Nephew.

Abnepos linealis. 3 **Abnepus linealis.**
The blood Nephew's or
Niece's Son.
The blood Nephew's or
Niece's Daughter.

Abmatertera magnus.
The Great Uncle's Grand-mother.
on the Mother's side.

Forundem.
of these
Promepos collat.
The collateral Nephew's Son.
Promepos collat.
The collateral Nephew's
Daughter, et sic in
infinitum.

Forundem.
of these
Promepos collat.
The collateral Nephew's Son.
Promepos collat.
The collateral Nephew's
Daughter, et sic in
infinitum.

Abnepos linealis. 4 **Abnepus linealis.**
The Grand-son of the blood
Nephew, or Niece.
The Grand-daughter of the
blood Nephew, or Niece.

Abnepos linealis. 5 **Abnepus linealis.**
The Great Grand-son of the blood
Nephew, or Niece.
The Great Grand-daughter of the blood
Nephew, or Niece.

Trinepos linealis. 6 **Trinepus linealis.**
The Great Great Grand-son of the blood
Nephew, or Niece, et sic in infinitum.
The Great Great Grand-daughter of the blood
Nephew, or Niece, et sic in infinitum.

agreeth well with the etymology of the word (heir) to whom the lands descend, for *hæres dicitur ab hærendo, quia qui hæres est hæret, hoc est, proximus est sanguine illi cujus est hæres. So as he that is hæres, sanguinis est hæres, et heres hæreditatis.* (Post, 7 b.)

And the learning of degrees (b) set out in the civil and canon law (r) (wherein I find some difference) is worth the knowledge, to the end that Littleton and the law may the better be understood, which I will divide into certain rules; whereof the first is,

That a person added to a person in the line of consanguinity maketh a degree. And it is to be understood, that a line is three-fold, viz. the line ascending, descending, and collateral. And first, for example, of the ascending line, take the son and add the father, and it is one degree ascending; add the grandfather to the father, and it is a second degree ascending.

So as how many persons there be, take away one, and you have the number of degrees. If there be four persons it is the third degree, if five the fourth, for one must exceed, and then you have the degree. Likewise by the descending, take the father and add the son, and it is one degree; then take the son and add the grandchild, and it is the second degree; and so likewise further. Wherein observe that the father, son, and grandchild, albeit there are three persons, yet they make but two degrees, because (as it hath been said) one must exceed for making a degree. (Flowd. 444.)

* It is to be noted, that in every line the person must be reckoned from whom the computation is made. And there is no difference between the canon and civil law in the ascending and descending line (1); for those whom the civilians do reckon in the second degree, the canonists do reckon in the first (2); and those whom they

(1) The words *but in the collateral line* there is seem necessary to the sense of this passage; and though not to be found in any edition of Lord Coke's Commentary, were probably omitted by mistake.—[Hargr. n. 2. 23 b.]

(2) A G. and A. are in the fourth degree, per utramque legem, C...B...D N. and K. are in the fourth degree by the canon law, but H...E...L in the eighth degree by the civil law. N. and C. are in I...F...M the fourth degree by the canon, J...G...N in the fifth by the civil law. Vide pro computatione graduum consanguinitatis juxta utramque legem Caus. 35. quæst. 5. pars 2. in Decret. Juxta jura canonica.—I. Ascendentium et descendentium quot sunt personæ, de quibus queritur, computatis, in-

termediis, prima dempta, tot sunt gradus inter eas. II. Pro collateralibus. Collateralium in linea æquali quoto gradu quis distat a stipite communi, toto distant inter se vel sibi attinent. Collateralium in linea inæquali quoto gradu remotior distat a communi stipite, toto inter se distant.—Juxta jus civile.—I. In linea recta ascendentium et descendentium quot sunt personæ de quibus queritur, computatis intermediis, una dempta, tot sunt gradus inter eas. II. Collateralium. 1. In linea æquali, quoto gradu qui distat a communi stipite, toto duplicato distant inter se, vel sibi attinent; nam quælibet persona facit gradum. 2. In linea inæquali, quot sunt personæ, stipite dempto, tot sunt gradus.—Nota in contractibus matrimonialibus computatio canonica est recepta, et hoc per decretalem tertii in concilio generali. Hall. MSS.—[Hargr. n. 3. 23 b. (142).]

(r) The doctrine of descents, or law of inheritance in fee-simple, depends on the nature of kindred, and the several degrees of consanguinity, which is defined to be *vinculum per-*
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(Vil. stat. 22
H. 8. cap. 28.
of marriages.
1 Inst. 682.
26 H. 8. cap.
22.)

*24 a

(Plowd. 444.)

(159)*

LITTLETON.

[Sect. 2.

10 a.]

Rules of de-

scend.

1. To the

next of blood.

place the fourth, these place *in the second. Therefore if we will know in what degree two of kindred do stand according to the civil law, we must begin our reckoning from one, by ascending to the person from whom both are branched, and then by descending to the other to whom we do count, and it will appear in what degree they are. For example, in brothers and sisters' sons, take one of them and ascend to his father, there is one degree; from the father to the grandfather, that is the second degree; then descend from the grandfather to his son, that is the third degree; then from his son to his son, that is the fourth. But by the canon law there is another computation, for the canonists do ever begin from the stock, namely, from the person of whom they do descend; of whose distance the question is. For example, if the question be, in what degree the sons of two brothers stand by the canon law, we must begin from the grandfather and descend to one son, that is one degree; then descend to his son, that is another degree; then descend again from the grandfather to his other son, that is one degree; then descend to his son, that is a second *degree; so in what degree either of them are distant from the common stock, in the same degree they are distant between themselves; and if they be not equally distant, then we must observe another rule. In what degree the most remote is distant from the common stock, in the same degree they are distant between themselves; and so the most remote maketh the degree. *Gradus dicitur à gradiendo, quia gradiendo ascenditur et descenditur.* And thus much of the civil and canon law is necessary to the knowledge of the common law in this point (3).

(g) *AND if a man purchase land in fee-simple and die without issue, he which is his next cousin collateral of the whole blood, how far soever he be (4) from him in degree, may inherit and have the land as heir to him.*

(3) See further as to consanguinity and the manner of computing its degrees by the civil and canon law, Bl. Law Tracts, 8vo. ed. v. 1. p. 14. and 173; and the annotations in the edit. of the *Corp. Jur. Canon.* by the *Pithæi*

on that part of Gratian's *Decretum* cited by Lord Hale; and Inst. lib. 3. tit. 6, et Dig. 38. tit. 10. and the commentators on those titles.—[Hargr. n. 1. 24 a.]

(4) *de lui*, L. and M. Roh. Red.

sonorum ab eodem stipite descendunt, the connexion or relation of persons descended from the same stock.

This consanguinity is either lineal or collateral. *Lineal* consanguinity is that which subsists between persons of whom one is descended in a right line from the other; as between father, grandfather, and great-grandfather, or between father, son, and grandson. Every generation in this direct lineal consanguinity constitutes a degree, reckoning either upwards or downwards. *Collateral* consanguinity is that which subsists between persons who lineally descend from the same ancestor, who is the *stirps* or root, the *stipes*, trunk, or common stock; but who do not descend the one from the other.

The method of computing the degrees of consanguinity by the canon law, which our law has adopted, is as follows: We begin at the common ancestor and reckon downwards, and in whatsoever degree the two persons, or the most remote of them, are distant from the common ancestor, that is the degree in which they are said to be related. *Infra*, 23 b. 2 Bl. Com. 202. 207. 3 Cru. Dig. 373.—[*Ed.*]

(e) All possible hereditary successions, says Sir Matthew Hale, may be distinguished into three kinds, viz. First, in the *descending* line, as from father to son, or daughter, nephew or niece, i. e. grandson or grand-daughter. Secondly, in the *collateral* line, as from brother to brother or sister, and so to brother and sister's children. Thirdly, in an *ascending* line,

Littleton sheweth here who shall be heir to lands in fee-simple; for he intendeth not this case of an estate tail, for that he speaketh of an heir of the whole blood, for that extendeth not to estates in tail, as shall be said hereafter in this chapter, section 6. (160) 10 a. (Flood. 414.)

Neither excludeth he brethren or sisters, because he hath a special case concerning them in this chapter, sect. 5, and in his chapter of Parceners; but this is intended *where a man purchaseth lands and dieth without issue, and having neither brother nor sister, then his next cousin collateral shall inherit (5). So as here is implied a division of heirs, viz., lineal (whoever shall first inherit), and collateral (who are to inherit for default of lineal). For in descents it is a maxim in law, *quodd linea recta semper præfertur transversali* (H). Lineal descent is conveyed downward in a right line; as

*10 b.

The lineal line preferred to the collateral line. Glan. lib. 7. ca. 3. 4. Bract. lib. 2.

(5) In the preceding page, Lord Coke begins his comment on that part of Littleton which describes the course of descent by the common law of England; and this seems to be a proper place for referring the student to some valuable writings published since Lord Coke's time on the same subject. See Hal. Hist. C. L. c. 11. Wright's Ten. 174. Gilb. Ten. 2. Dalrymp. Feud. Prop. 4th ed. c. 5. p. 159; and Bl. Law of Desc. To the first and last of these books it is that we principally call the attention of the student; though it must be confessed, that in all of them the history of the law is so learnedly and critically traced, and the feudal principles, on which it chiefly depends, are so clearly unfolded, that a subject in itself dry and ab-

struse, becomes not only plain and intelligible, but even agreeable and interesting. Mr. R. Robinson's Discourse concerning the Law of Inheritances in Fee-simple, is another treatise on the same subject, which should not be passed over without notice. Many parts of it are ingeniously written; but unfortunately the author has chiefly exerted his talents in inventing a new calendar of consanguinity, the explanation of which employs a very considerable part of the work; and by always referring to this, and by introducing a number of arbitrary terms, which are only intelligible as he explains them, he involves his subject, before too much embarrassed with difficulties, in still greater perplexity.—[Hargr. n. 1. 10 b. (54).]

either direct, as from son to father, or grandfather (which is not admitted by the law of England); or in the transversal line, as to the uncle or aunt, great-uncle or great-aunt, &c. And because this line is again divided into the line of the father, or the line of the mother, this transverse ascending succession is either in the line of the father, grandfather, &c. on the blood of the father; or in the line of the mother, grandmother, &c. on the blood of the mother. The former are called *agnati*, the latter *cognati*. 2 Hal. H. C. L. c. 11. p. 113, 114. See *Gradus Parentelæ*. The rules which govern the law of descents in England, will be considered, in this chapter, under two general heads. 1st. To the next in blood; under which division will be stated, the preference of the lineal line over the collateral line; the doctrine of representation; and the exclusion of lineal ascent. 2d. To the most worthy of blood; which head will embrace the doctrine of the preference of males to females, and of the paternal line over the maternal line, with the rules as to descents *ex parte paterna* and *ex parte materna*; the right of primogeniture; and the exclusion of the half blood. And here we may remark, as introductory to the doctrine contained in this chapter, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead: *Nemo est hæres viventis*. Before that time, the person who is next in the line of succession, is called an heir apparent, or heir presumptive. Heirs apparent are such whose right of inheritance is indefeasible, provided they outlive their ancestor; as the eldest son or his issue, who must by the course of the common law be heir to the father, whenever he happens to die. Heirs presumptive are such who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs; but whose right of inheritance may be defeated, by the contingency of some nearer heir being born. 2 Bl. Com. 208. *Infra*, 11 b.—[Ed.]

(H) This rule, says Sir William Blackstone, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possession of the parents should go, upon their decease, in the first place, to their children, as those to whom they have given being, and for whom they are therefore bound to provide. 2 Bl. Com. 210.—[Ed.]

cap. 30. fol. 65. Brit. c. 119. Fleta, lib. 6. cap. 1. & 2. (Plowd. 444.) Bract. lib. 2. cap. 30. fol. 64. Fleta, lib. 5. cap. 5. & lib. 6. cap. 1. & 2. Brit. ca. 119. Mirror, 11. cap. 1. sect. 3. 30 Ass. p. 47. (3 Co. 41. 42.) (161)*

from the grandfather to the father, from the father to the son, &c. Collateral descent is derived from the side of the lineal; as grandfather's brother, father's brother, &c. "*Next cousin collateral shall inherit*" doth give a certain direction to the next cousin to the son, and therefore the father's brother and his posterity shall inherit before the grandfather's brother and *his posterity. *Et sic de cæteris*; for *propinquior excludit propinquum, et propinquus remotum, et remotus remotiorem*.

Upon this word (*next*) I put this case. One hath issue two sons, A. and B., and dieth; B. hath issue two sons, C. and D., and dieth. C. the eldest son hath issue and dieth. A. purchaseth lands in fee-simple, and dieth without issue, D. is the next cousin, and yet shall not inherit, but the issue of C.; for he that is inheritable is accounted in law next of blood. And therefore here is understood a division of *next*, viz., next *jure representationis*, and next *jure propinquitatis*; that is, by right of representation and by right of propinquity. And Littleton meaneth of the right of representation, for legally in course of descents he is next of blood inheritable (1). And the issue of C. doth represent the person of C.; and if C. had lived, he had been legally the next of blood. And whensoever the father, if he had lived, should have inherited, his lineal heir by right of representation shall inherit before any other, though another be, *jure propinquitatis*, nearer of blood. And therefore Littleton intendeth this case of next cousin of blood immediately inheritable. So as this produceth another division of next blood, viz., immediately inheritable, as the issue of C.; and mediately inheritable, as D., if the issue of C. die without issue; for the issue of C. and all that line, be they never so remote, shall inherit before D. or his line; and therefore Littleton saith well, *how far soever he be from him in degree*. And here ariseth a diversity in law between next of blood inheritable by descent, and next of blood capable by purchase. And therefore in the case before mentioned, if a lease for life were made to A., the remainder to his next of blood in fee; in this case, as hath been said, D. shall take the remainder, because he is next of blood and capable by purchase, though he be not legally next to take as heir by descent (6).

* Next of blood," intended of the next jure representationis. 19 R. 2. tit. Garr. 100.

(2 Inst. 7.)

30 Ass. p. 47.

Diversity herein in the case of purchase.

(6) "Harpur having a son and four daughters, viz. A. B. C. and D. devises to the son in tail, remainder to B. and C. for life, remainder *proximo consanguinitatis et sanguinis* of the devisor; and Easter 17 Jam. by two justices against one, the remainder vests in all the daughters when the son dies without issue. But afterwards, Mich. 10 Jam. *per totam curiam*, it vests in the eldest daughter only, and not in all the daughters; 1. because *proximo*; 2. because an express estate is limited to two of the daughters.—*Periman and Pierce*."—Hal. MSS. See S. C. in Palm. 11 and 303. 2 Rol. Rep. 256. Bridgm. 14. O. Bendl. 103. 106.—Lord Chief Justice Hale also gives a note on the words *proximus*

de sanguine vel consanguinitate; in which after citing from *Ratcliffe's case*, 3 Co. 40. that on the stat. 21 H. 8. the father or mother shall be preferred in administration to the son, as next of blood before the brother, he adds, "Nota, ruled that in administration, the sister of the half blood should be preferred in administration before the son of the sister of the whole blood; but when they are in *æquali gradu*, the sister of the whole blood shall be preferred before the sister of the half blood. M. 23 Ch. & M. 1650. B. R. *Brown's case*." Hal. MSS. See further as to *proximus de sanguine* in Dy. 333 b.—[Hargr. n. 2. 10 b. (55).]

(1) And these representatives take neither more nor less, but just so much as their principals would have done. This taking by representation is called succession in *stirpes*,

* *BUT* if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee-simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, yet the father is nearer of blood; because it is a maxim in law, that inheritance may lineally descend, but not (7) ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heir to the son (as by law he ought), and after the uncle dieth without issue, living the father, the father shall have the land as heir to the uncle, and not as heir to his son, for that he cometh to the land by collateral descent, and not by lineal ascent.

(163)*
LITTLETON.
[Sect. 3.
10 b.]
Exclusion of
lineal ascent
—the father,
though next
of blood, not
inheritable to
his son's es-
tate;
unless he
claim by col-
lateral de-
scend, as
heir to his
son's uncle;

(e) "It is a maxim in law, that inheritance may lineally descend, but not ascend." I never read an opinion in any book old or new against this maxim, but only in *lib. rub.* where it is said, (d) *si quis sine liberis decesserit, pater aut mater ejus in hæreditatem succedat, vel frater et soror si pater et mater desint; si nec hos habeat, soror patris vel matris, et deinceps qui propinquiores in parentellâ fuerint hæreditariò succedant; et dum virilis sexus extiterit, et hæreditas abinde sit, fœmina non hæreditat.* But all our ancient authors and the constant opinion ever since do affirm the maxim.

11 a.
(c) Pl. Com.
293 b. Os-
borne's case.
(d) Lib. Rub.
ca. 70.

By this maxim in the conclusion of his case, only lineal ascension in the right line is prohibited, and not in the collateral. (e) *Quælibet hæreditas naturaliter quidem ad hæredes hæreditabiliter descendit, nunquam quidem naturaliter ascendit. Descendit itaque jus quasi ponderosum, quod cadens deorsum rectâ lined vel transversali, et nunquam reascendit eâ viâ quâ descendit post mortem antecessorum, à latere tamen *ascendit alicui propter defectum hæredum inferius provenientium;* so as the lineal ascent is prohibited by law, and not the collateral (8). And in prohibiting

(e) Brit. cap.
119. Fleta.
lib. 6. ca. 1.
Numb. ca. 27.
Ratcliffe's
case, ubi su-
pra. (3 Co. 40.

(163)*

(7) *linealment*—P. and Red.

(8) In *Ratcliffe's case*, 3 Co. 40, the reasons given for excluding lineal ascent are, *first*, that fathers and mothers are not of the blood of the children; *secondly*, that the exclusion is agreeable to the Jewish law, as prescribed to Moses by God himself; and *thirdly*, that it tends to avoid that confusion and diversity of opinions in the case of descents, of which the allowance of lineal ascension by the civil law is said to be the occasion. Lord Coke himself controverts the *first* of these reasons by the words of Littleton in the section here commented upon, and by the case of administration, in which the father or mother is preferred as *nearest of blood* to their children, and also by the case of a remainder to the son's *nearest of blood*, under

which description the father is entitled to take by purchase. But as to the two other reasons, Lord Coke rather appears to adopt them. However, neither of them seems satisfactory. The inference from God's precept to Moses is unwarranted, unless it can be shown, that it was promulgated as a law for mankind in *general*, instead of being like many other parts of the Mosaic law, a rule for the direction of the Jewish nation *only*. Besides, by the Jewish law, the father did succeed to the son in exclusion of his brothers, unless one of them married the widow of the deceased, and raised up seed to him. See Bl. Law Tracts, v. 1. p. 192. 8vo. ed. and Seld. de Succes. Ebræor. c. 12. there cited. The argument from the supposed confusion and uncertainty, which might arise,

according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. 2 Bl. Com. 217. The Jewish succession was after the same manner, Seld. de Sacc. Ebr. c. 1; but the Roman somewhat differed. See Nov. 110. c. 3. Inst. 3. 1. 6. 2 Bl. Com. 218.—[Ed.]

the lineal ascent, the common law is assisted with the law of the twelve tables (9).

- (164)* * Here our author, for the confirmation of his opinion, draweth a reason and a proof (as you have perceived) from one of the maxims of the common law.

11 b. "And his uncle enter into the land." For if the uncle in this case doth not enter into the land, then cannot the father inherit the land: for there is another maxim in law herein implied, (f) that a man, that claimeth as heir in fee-simple to any man by descent, must make himself heir to him that was last seised (x) of the actual freehold and inheritance (10). And if the uncle in this case doth not

if lineal ascent should be permitted, is not less liable to objection; because lineal ascent might be governed by the same rules as lineal descent; and what is the difference between the two, that should create more confusion and uncertainty in the one case than in the other? Our modern writers account for our law's disallowance of lineal ascent in a very different way; and according to them, it in a great measure originated from the nature of ancient feudal grants, which, like estates tail, being confined to the first feudatory and his descendants, necessarily excluded his father and mother, and all paramount them and also his collateral relations. How this rule in practice became extended so as to exclude lineal ascent universally, without confining it to the cases to which the feudal reason for the rule is applicable, and yet at the same time is so construed, as to let in all collateral relations, and even the father himself collaterally, and by the medium of others, is not now very easy to explain, though this has been attempted. See Wright's Ten. 180. and Bl. Law Tracts, v. 1. p. 183. 8vo. ed. See also a learned note on the subject in *Littleton avec Observat. par M. Houard*. This edition of Littleton is in 2 vol. 4to. and was published at Rouen in 1766.—[Hargr. n. 1. 11 a. (56).]

[And see Sulliv. Lect. xiv. 2 Bl. Com. 208. Lord Hale, in his History of the Common Law, says, that by the Law of Normandy, the father was postponed to the brother and sister, and their issues, but was preferred before the uncle. According to the Jewish law, the father was preferred before

the brother; by the Roman law he succeeded equally with the brother. But by the English law the father cannot take from his son by an immediate descent, but may take as heir to his brother, who was heir to his son, by collateral descent. 2 Hist. c. 11. 5th ed. p. 93. A father or mother may, however, be cousin to their own child, and in that relation may inherit from him, notwithstanding the relation of father or mother. *Eastwood v. Vincke*, 2 P. Wms. 614.—[Ed.]

(9) See Tab. 5. 1. *de successione ab intestato*; but neither in this nor in any other part of the 12 Tables, do I see any thing to exclude lineal ascent; and as I have not met with any book on the Roman law in which such an exclusion is mentioned, I conclude, that Lord Coke is mistaken in his idea of our laws conforming to the law of the 12 Tables. The mother was indeed excluded; but it was not because the law of the 12 Tables did not permit lineal ascent, but on account of her sex, that law preferring the *agnati*, or those related through males, and excluding the *cognati*, or those related through females. See Inst. 3. 3 Princ.—[Hargr. n. 2. 11 a. (57).]

(10) "Grandfather, father, and son; grandfather dies; father is bound in an obligation or warranty, and dies before entry. Held, that the son is not liable, because he shall make himself heir to the grandfather. 24 E. 3." Hall. MSS.—Hargr. n. 3. 11 b. (58).]

[See 2 Saund. 8 h. n. 4. 2 Cru. Dig. 490.] —[Ed.]

(x) The last actual seisin in any ancestor, says Sir Matthew Hale, makes him, as it were, the root of the descent, equally to many intents, as if he had been a purchaser; and therefore he that cannot, according to the rules of descents, derive his succession from him that was last actually seised, though he might have derived it from some precedent ancestor, shall not inherit. 2 Hal. Hist. c. 11. p. 120. The law requires this notoriety of possession as evidence that the ancestor had that property in himself, which is to be transmitted to his heir. The seisin therefore of any person makes him the root or stock from which all future inheritance by right of blood must be derived, which is briefly expressed in the maxim of Fleta, *Seisina facit stipitem*. See 2 Bl. Com. 208. 212. 227, 228. 1 Bl. Law Tr. 180. 8 Co. 36.—[Ed.]

enter, then had he but a freehold in law, and no actual freehold, but the last that was seised of the actual freehold was the son to whom the father cannot make himself heir; and therefore Littleton saith, *and his uncle enter into the land, as by law he ought*, to make the father to inherit, as heir to the uncle.

"As by law he ought." These words as a key, do open the secrets of the law; for hereupon it is concluded, that where the uncle cannot get an actual possession by entry or otherwise, there the father in this case cannot inherit. And therefore if an advowson be granted to the son and his heirs, and the son die without issue, and this descend to the uncle, and he die before he doth or can present to the church, the father shall not inherit, because he should make himself heir to the son, which he cannot do (1.). And so of a rent and the like. But if the uncle had presented to the church, or *had seisin of the rent, there the father should have inherited. For Littleton putteth his case of an entry into land but for an example. If the son make a lease for life, and die without issue, and the reversion descend to the uncle, and he die, the reversion shall not descend to the father, because in that case he must make himself heir to the son. A. infeoffs the son with warranty to him and his heirs, the son dies, the uncle enters into the land and dies, the father if he be impleaded shall not take the advantage of this warranty, *for then he must vouch A. as heir to his son, which he cannot do (11); for albeit the warranty descended to the uncle, yet the uncle leaveth it as he found it, and then the father by Littleton's (*ought*) cannot take advantage of it. For Littleton, sect. 603. saith that warranties shall descend to him that is heir by the common law; and sect. 718. he saith that every warranty which descends, doth descend to him that is heir to him which made the warranty by the common law; which proveth that the father shall not be bound by the warranty made by the son, for that the father cannot be heir to the son, that made the warranty. And a warranty shall not go with tenements, whereunto it is annexed, to any special heir, but always to the heir at the common law (12). And therefore if the uncle be seised of certain lands, and is disseised, the son release to the disseisor, with warranty, and die without issue, this shall bind the uncle; but if the uncle die without issue, the father may enter, for the warranty cannot descend

34 Ass. p. 20.
19 E. 2.
Quar. Imped.
177. 45 E. 2.
12. 40 Ass.
p. 6.

(165)*

*12 a.

vid. sect. 603.
718. (Ame,
329.)

vid. sect. 735,
736, 737.

(11) "*Quare* of this case of warranty; for though the lien of warranty descends from him who makes the warranty, to the heir at common law, and it cannot descend to the special heir, because it is a thing in gross, yet the benefit of a warranty, being once annexed to land, shall go in divers cases as incident to the land, to the special heir or assignee. Thus a gift of *borough-english*, with a warranty, shall go to the youngest son with the land." Hall. MSS.—See acc.

2 Roll. Abr. 743, where it is said, that the father may vouch on such a warranty to the uncle. In Gilb. Ten. 18. there is a reference to Lord C. J. Hale's note on this part of Lord Coke, from which it appears that Lord C. B. Gilbert had seen Lord Hale's MSS. notes.—[Hargr. n. 1. 12 a. (60).]

(12) See acc. both as to estoppels and warranties, Hob. 31. 8 Co. 54. But observe what is said by Lord Hale in the preceding note.—[Hargr. n. 2. 12 a.]

(1.) But if the advowson be appendant to a manor, there actual seisin of the manor will give an actual seisin of the advowson. Post, 15 b. n. 1. (85). Watk. Desc. 60, 61.—[Ed.]

26 H. 6. 33.
John Crook's
case. (5 Co.
79.)

(166)*

upon him. So if the son concludeth himself by pleading concerning the tenure and services of certain lands, this shall bind the uncle; but if the uncle die without issue, this shall not bind the father, because he cannot be heir to the son, and consequently not to the estoppel in that case; but if it *be such an estoppel as runneth with the land, then it is otherwise (13).

10 b.
Diversity
herein in the
case of pur-
chase.
5 E. 6. tit. Ad-
ministr. Br.
47. Barcliff's
case, ubi su-
pra. See in
the Chapter
of Socage.
(Hob. 33.)
(3 Co. 40.)

"*Yet the father is nearer of blood.*" And therefore some do hold upon these words of Littleton, that if a lease for life were made to the son, the remainder to his next of blood, that the father should take the remainder by purchase, and not the uncle, for that Littleton saith the father is next of blood, and yet the uncle is heir. As if a man hath issue two sons, and the eldest son hath issue a son and die, a remainder is limited to the next of his blood, the younger son shall take it, yet the other is his heir.

11 b.
Descent to an
heir may be
defeated by
the birth of a
posthumous
heir nearer of
blood.
(g) 11 Ass.
p. 6. Doct. &
Stud. 12 b.
32 H. 6. 25.
(h) 19 H. 6. 61.

(g) Note, that true it is that the uncle in this case is heir, but not absolutely heir; for if after the descent to him the father hath issue a son or daughter, that issue shall enter upon the uncle (14). (h) And so it is, if a man hath issue a son and a daughter, the son purchaseth land in fee and dieth without issue, the daughter shall inherit the land, but if the father hath afterward issue a son, this son shall enter into the land as heir to his brother, and if he hath issue a daughter and no son, she shall be coparcener with her sister.

LITTLETON.
[Sect. 4.
12 a.]
2. To the most
worthy of
blood.—
(167)*

*AND in case where the son purchaseth land in fee-simple, and dies without issue, they of his blood on the father's side shall inherit as heirs to him, before any of the blood on the *mother's side: but if he hath no heir on the part of his father, then the land shall descend to the heirs on the part of the mother* (15).

Preference of
male heirs over heirs female; heirs on the part of the father shall inherit before heirs
on the part of the mother.

(13) "The son makes lease for life, and dies; the uncle releases to the lessee for life in tail on condition, and dies. *Quære*, who shall enter for the condition broken, as the reversion in fee doth not descend to the father?" Hal. MSS.—[Hargr. n. 3. 12 a. (61.)]

(14) Here Lord Coke is silent as to the right to the intermediate profits from the death of the father. In the case of *Basset* and *Basset*, Lord Ch. Hardwicke held, that a posthumous son, claiming under a remainder in a settlement, was, by construction of the 10 & 11 W. 3. c. 16. which preserves remainders for posthumous children, where no estate is limited to trustees for that purpose, intitled to the mean profits. See 3 Atk. 203. But in the same case, Lord Hardwicke seems to have taken it for granted, that on a *descent* the mean profits belong to the uncle; for he directed that the profits of the *estate descended* should be accounted for by the uncle, only from the birth of the post-

humous son. See ant. 55 b. (vol. 1. p. 640.) where Lord Coke puts the case of a daughter's being entitled against a posthumous brother to corn sowed before his birth; which seems to show, that Lord Coke did not consider the posthumous child as entitled to any mean profits on a descent. See also Wils. Rep. vol. 2. p. 526. where Lord C. J. De Grey, in delivering the opinion of the court of C. P. on a question whether a *posthumous* son was *actually seized*, denies that the posthumous son in the case of a descent, can be entitled to any profits received before his birth, and cites 9 H. 6. 25. as an authority in point.—[Hargr. n. 4. 11 b. (59.)]

[See *Goodtitle*, d. *Newman v. Newman*, 3 Wils. 516. 528. 3d edit. Ant. p. 136, 137. n. (1.)]—[*Ed.*]

(15) *Et cest l'opinion de toutes les justiciars M. 12 E. 4. Mes la fuit tenuz si terre descende a un home de part son pere, qui devia sans issue, que son prochain heire de part son pere inheritera a luy cest assavoir le prochain que*

By this it appeareth, that our author divideth heirs into heirs of the part of the father, and into heirs of the part of the mother.

12 a.

Vid. sect. 354.
an excellent
point.

(i) "*They of his blood on the father's side.*" Here it is to be understood, that the father hath two immediate bloods in him, viz. the blood of his father, and the blood of his mother (16). Both these bloods are of the part of the father. (k) And this made ancient authors say, that if a man be seised of lands in the right of his wife, and is attainted of felony, and after hath issue, this issue should not inherit his mother, for that he could derive no blood inheritable from the father. And both these bloods of the *part of the father must be spent *before the heir of the blood of the part of the mother shall inherit, wherein ever the line of the male of the part of the father, that is, the posterity of such male, be they male or female, (who ever in descents are preferred,) must fail before the line of the mother shall inherit. (l) And the reason of all this, for that the blood of the part of the father is more worthy, and more near in judgment of law, than the blood of the part of the mother (m).

(i) Bract. lib. 2. fol. 65. 67. 68, 69, &c.
Fleta, lib. 6. ca. 1, 2, &c.
Britton, ca. 123, 119. Pl. Com. 444.
Clerc's case. Tr. 19 E. 1. in Banco Rot. 25. Lincoln.
Will. Seel's case.
(k) Britton, fol. 15. Fleta, lib. 1. ca. 18. Pl. Com. 445, 446, &c.
Clerc's case. (1 Sid. 200.)
(168)*
* 12 b.
(Plowd. 444.)
(l) 19 R. 2. Gar. 100.

est del sank le pere de part layel. Et pur defaute de tiel heire, ceux que sont de sank le pere del part le mere le pere, S. laïesse doivent enheriter. Et s'il ny ad tiel heire de part le pere donques le seignour, avera le terre par eschete. Red. But this passage is not in any edition prior to Redman's, and seems an addition to Littleton by another hand, and to be an opinion extracted from 12 E. 4. 14. pl. 12. which is indeed cited in the margin of Redman.—[Hargr. n. 4. 12 a.]

(16) But sometimes a man can only have immediate inheritable blood from one parent, as where his father or mother is an alien or person attainted; and this it seems suffices to enable children to inherit from the parent, who confers the inheritable blood, and also to inherit to each other. See acc. ante 8 a. n. 2. (vol. 1. p. 90. n. 6.) and the following note by Lord Hale on Lord Coke's next passage, where he mentions, that according to ancient authors the issue of an attainted father cannot inherit to the mother. "This seems not to be law. A female heretrix takes an alien to husband, and they have issue: the issue shall inherit to the mother. Post, Sect. 114. and fol. 33 a. for dower of wife being alien or attainted. Hal. MSS. To the same purpose is what follows, being a note on fo. 8 a. post, where Lord Coke asserts, that the

children of an alien cannot inherit to each other, though he allows that the children of one attainted, if born before the attainder, may. "*Quære* of this; for it seems the blood of the mother suffices to make them inheritable one to the other, and this was the principal reason in *Hobby's case*." Hal. MSS. Also Lord Hale, in another note in fol. 8 a. post, abridges the case of *Bacon* and *Bacon* from Cro. Cha. and cites *Stephen's case* in the *dutchy* as another case of the same kind, and then there is the note following. "Yet note that he cannot be heir to his mother, because she is an alien. Husband denizen takes wife an alien, or wife takes husband an alien, and they have issue. It seems the issue shall inherit to the father in the first case, to the mother in the second. *Ergo videtur*, that if alien hath issue by denizen two sons, one son shall inherit to the other, because the mother is a denizen; and so in the case of a person attainted, having issue after attainder; and this was one of the reasons of *Hobby's case*." Hal. MSS. This doctrine is agreeable to Lord Hale's argument when he gave judgment in *Collingwood* and *Pace*, cited ante fol. 8 a. n. 2 (vol. 1. p. 90. n. 6.) and also confirms the observation hazarded in n. 5. fol. 8 a. post.—[Hargr. n. 7. 12 a. (62).]

(u) So the son shall be admitted before the daughter; and the brother is preferred before the sister; and the uncle before the aunt. This preference of males to females is evidently derived from the feudal law; but our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males: for though daughters are excluded by sons, yet they succeed before any collateral relations. 2 Hal. Hist. c. 11. p. 116. 2 Bl. Com. 214.—[Ed.]

Britton, ca.
118, 119.
Fleta, lib. 6.
ca. 2.

"*Before any of the blood on the mother's side.*" And it is to be observed, that the mother hath also two immediate bloods in her, viz. her father's blood, and her mother's blood. Now to illustrate all this by example, Robert Fairfield, son of John Fairfield and Jane Sandie, takes to wife Ann Boyes, daughter of John Boyes and Jane Bewpree, and hath issue William Fairfield, who purchaseth lands in fee. Here William Fairfield hath four immediate bloods in him, two of the part of his father, viz. the blood of the Fairfields, and the blood of the Sandies, and two of the part of his mother, viz. the blood of the Boyes, and the blood of the Bewprees, and so in both cases upward *in infinitum*. Now admit that William Fairfield die without issue, first the blood of the part of his father, viz. of the Fairfields, and for want thereof the blood of the Sandies (for both these are of the part of the father), if both these fail, then the heirs of the part of the mother of William Fairfield shall inherit, viz. first the blood of the Boyes, and for default thereof, the blood of the Bewprees.

(169)*

19 a.

But the heir
must be of the
blood of the
first pur-
chaser:

(m) Pl. Com.
Sir E. Clere's
case, 447.

(n) Fleta, lib.
6. ca. 1, 2, &c.
Bract. lib. 2.

fol. 66. 67, 68,
&c. Brit-
ton, cap. 119.

Com. 445 & 450.
7 E. 6. Dyer 6.

24 E. 3. 24.
37 Ass. 4.
40 E. 3. 9.

42 E. 3. 10.
45 E. 3.
Release 28.

7 H. 5. 3, 4.
8 Ass. 6.
35 Ass. 2.

5 E. 4. 7.
3 H. 5.
21 H. 7. 33.

40 Ass. 6.
Ratcliffe's case.
3 Co. 42.

(Ante, 220 b.)

24 E. 3. 12.
49 Ass. p. 4.

12 E. 4. 14. Pl.

Com. 445 & 450.

7 E. 6. Dyer 6.

24 E. 3. 24.

37 Ass. 4.

40 E. 3. 9.

42 E. 3. 10.

45 E. 3.

Release 28.

7 H. 5. 3, 4.

8 Ass. 6.

35 Ass. 2.

5 E. 4. 7.

3 H. 5.

21 H. 7. 33.

40 Ass. 6.

Ratcliffe's case.

3 Co. 42.

(Ante, 220 b.)

(m) And note, it is an old and true maxim in law, that none shall inherit any lands as heir, but only the blood of the first purchaser (n), for (*) *refert à quo fiat perquisitum*. As for example, Robert Coke taketh the daughter of Knightley to wife, and purchaseth lands to him and to his heirs, and by *Knightley hath issue Edward, none of the blood of the Knightleys, though they be of the blood of Edward, shall inherit, albeit he had no kindred but them, because they were not of the blood of the first purchaser (o), viz. of Robert Coke (17).

(17) "And therefore if the heir of the escheat. 49 Ass. p. 4." Hall. MSS.—
part of the father be attainted, the land shall [Hargr. n. 6. 12 a.]

(n) The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether by sale, gift, devise, or any other mode, except only that of descent. 2 Bl. Com. 220. And see n. (o) infra.—[Ed.]

(o) This rule, which was entirely unknown among the Jews, Greeks, and Romans, is plainly derived from the feudal law; for when feuds first became hereditary, no person could succeed to a *feudum novum* but the lineal descendants of the person who first acquired it, who was called the *perquisitor*. So that if a person died seised of a feud of his own acquiring, without leaving issue, it did not go to his brothers, but reverted to the donor. But if it was a *feudum antiquum*, that is, if it had descended to the vassal from his ancestors, then his brothers, or such other collateral relations as were descended from the person who first acquired it, might succeed. However, when the feudal rigour was in part abated, a method was invented to let in the collateral relations of the first purchaser to the inheritance by granting a *feudum novum*, to hold *ut feudum antiquum*, that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were permitted to succeed even *in infinitum*, because they might have been of the blood of the first imaginary purchaser. In imitation of this rule, it has long been established, that every acquisition of an estate in fee-simple by purchase, is considered by the English law as a *feudum antiquum*, or a feud of indefinite antiquity; and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance. But when an estate has really descended in a course of inheritance to the person last seised, the strict rule of the feudal law is still observed; and none are admitted but the heirs of those through

*BUT, if a man marrieth an (18) inheritrix of lands in fee-simple, who have issue a son, and die, and the son enter into the tenements, as son and heir to his mother, and after dies without issue, the heirs of the part of the mother ought to inherit, and not the heirs of the part of the father. And if he hath no heir on the part of the mother, then the lord, of whom the land is holden, shall have the land by escheat. (19) In the same manner it is, if lands descend to the son of the part of the father, and he entereth, and afterwards dies without issue, this land shall descend to the heirs on the part of the father, and not to the heirs on the part of the mother. And if there be no heir of the part of the father, the lord of whom the land is holden shall have the land by escheat. And so see the diversity, where the son purchaseth land or tenements in fee-simple, and where he cometh to *them by descent on the part of his mother, or on the part of his father.*

LITTLETON.
[Sect. 4.
12 a.]
and therefore
where lands
descend from
the mother,
the heirs ex-
parte mat-
erna shall in-
herit.

And e con-
verso.

(170)*

"But if a man marrieth an inheritrix, &c." Here there is another maxim, (n) that whensoever lands do descend from the part of the mother, the heirs of the part of the father shall never inherit. And likewise when lands descend from the part of the father, the heirs of the part of the mother shall never inherit (20). *Et sic paterna paternis, et e converso, materna maternis.* For more manifestation hereof, and of that which hereafter shall be said touching descents, see a table in the beginning of this chapter.

13 a.
(n) 39 E. 3. 29.
40 E. 3. 12.

It is necessary to be known in what cases the heir of the part of the mother shall inherit, and where not. If a man be seised of lands as heir of the part of his mother, and maketh a feoffment in fee, and taketh back an estate to him and to his heirs, this is a new purchase, and if he dieth without issue, the heirs of the part of the father shall first inherit (21). If a man so seised maketh a feoffment in

12 b.
What shall
be a purchase
and break
the descent,
as to entile
the pater-
nal heir to a
preference
over the ma-

(18) *feme*, L. and M. Roh. P. Red.

(19) All between *En mesme* and *sic vide* omitted in Red.

(20) "But if the eldest son purchases land, and it descends to the youngest son, and he dies without heir of the part of the father, it shall descend to the heir on the part of the mother; because they have one and the same mother." Hal. MSS.—[Hargr. n. 5. 13 a. (67).]

[But Lord Hale, in 3 Hist. 127. observes, that if the son purchases lands and dies without issue, and it descends to any heir of the part of the father, then if the line of the father, after entry and possession, fail, it shall never return to the line of the mother; though in the first instance, or first descent from the son, it might have descended to the heir of the part of the mother: for by this descent

and seisin it is lodged in the father's line, to whom the heir of the part of the mother can never derive a title, as heir, but it shall rather escheat. But if the heir of the part of the father had not entered, and then that line had failed, it might have descended to the heir of the part of the mother, as heir to the son.]—[*Ed.*]

(21) But here Lord Coke must be understood to speak of two distinct conveyances in fee; the *first* passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land; and the *second* regranting the estate to him. For if in the first feoffment, the use had been expressly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise an use in the feof-

whom the inheritance has passed; for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. Descents *ex parte paterna et materna* depend on this distinction. 2 Bl. Com. 220. 222. *Infra*, 12 a. 2 Hal. Hist. 190. —[*Ed.*]

terial heir,
or not.

9 H. 7. 24.
(Plowd. 47.
Ante, 202.)

(171)*

(o) 7 H. 6. 4.
1 Co. 100.
Shelley's
case.

(p) 5 E. 2. tit.
Avoir, 207.
Hob. 31.)

(q) 5 E. 3.
Avoirtry 207.
(3 Co. 54
3 Co. 32 b.)

fee *upon condition, and die, the heir of the part of the father, which is the heir at the common law, shall enter for the condition broken, but the heir of the part of the mother shall enter upon him, and enjoy the land. (o) A man so seised maketh a feoffment in fee, reserving a rent to him and to his heirs, this rent shall go to the heirs of the part of the father (p); but (p) if he had made a gift in tail, or a lease for life, reserving a rent, the heir of the part of the mother shall have the reversion, and the rent also as incident thereunto shall pass with it; but the heir of the part of the mother shall not take the advantage of a condition annexed to the same, because it is not incident to the reversion, nor can pass therewith. (q) If a man had been seised of a manor as heir on the part of his mother, and before the statute of *Quia emptores terrarum*, had

fee, and consequently the use resulted to the feoffor, in either case he is in of his *ancient use*, and not by purchase. Adj. acc. 3 Lev. 406. and 2 Salk. 59. and see acc. post, 13 a. and ant. 22 b (p. 140. 143.) What shall be a *purchase*, and break the *descent*, so as to entitle the *paternal* heir to a preference over the *maternal* heir, particularly in the case of a devise to the heir, the student may inform himself by the authorities cited in Vin. Abr. *Heir*, W. 1. 2. to which add *Batley* and *Trevillian*, Mo. 278. *Hinde* and *Lyon*, 3 Leon. 64. 70. and Dy. 124. *Hainsworth* and *Pretty*, Cro. Eliz. 833. 919. *Brown* and *Taylor*, Cro. Cha. 38. *Clark* and *Smith*, 1 Salk. 241. and 1 Lutw. 793. *Smith* and *Trigg*, 8 Mod. 23. and 1 Stra. 487. *Ratcliffe's case*, 1 Stra. 267. *Martin* and *Strachan*, 1 Wils. Part 1. p. 66. and *Hurst* and *The Earl of Winchester*, Bur. 4. pt. v. 2. p. 879. In this last case, a feme covert by force of a power appointed by will to her heir in fee, but charged the lands with debts and legacies; and it was adjudged in B. R. that the heir took by *descent*, and that the appointment had no other operation than making the estate subject to the debts and legacies. One leading principle, which this and the other authorities seem clearly to establish, is, that whenever a *devise* gives to the heir the same estate in *quality* as he would have by *descent*, he shall take by the *latter*, which is the title most favoured by the law; and that merely charging the estate with debts or legacies will not break the *descent*. This is only one of the many useful propositions which might be extracted on the subject as the result of the long list of cases before cited, if this was the proper place for a discussion so nice and difficult.—[Hargr. n. 2. 12 b. (63).]

[See acc. that a feoffment and re-feoffment

break the line of descent, 7 T. R. 105. So where a person seised in fee of a copyhold of inheritance by descent *ex parte materna*, surrendered the same to the use of himself for life, remainder to such persons and for such estates as he should by deed or will, attested by three witnesses, appoint, remainder in default of appointment to himself in fee; after which he made a mortgage, and surrendered to the use of the mortgagee in fee, who upon repayment of the principal and interest, surrendered again to the mortgagor: it was held that the line of descent was thereby broken, and that the estate descended to the paternal heir. *Doe, d. Harman v. Morgan*, 7 T. R. 103. So a fine *sur grant et render* will break the descent, Dy. 237. *Price v. Langford*, Carth. 140. 1 Salk. 92; for it has the like operation as a feoffment and re-feoffment. Watk. Desc. 185. 1 Prest. Conv. 210.* But it is otherwise of a fine *sur cognizance de droit come ceo*; for the former is the only sort of fine which gives a *new estate*. Watk. Desc. 185. So, with respect to a recovery, if no uses be declared, nor any raised to the recoveror, its operation is the same as to this point, as a feoffment or fine. Each of these conveyances passes a fee, 1 Burr. 92; but the fee effected by either is immediately to the use of the person conveying (if such appears to be the intention of the parties, Gilb. Rep. 17. Dougl. 26.); and as he is thus in his *ancient use*, and the statute uniting the possession to it, he is considered as in of his *old estate*; and consequently the estate remains as before. 1 And. 127. Hob. 27. 9 Co. 7 b. Dy. 146. pl. 70. 71. 2 Brownl. 171. Cro. Jac. 643. Gilb. Rep. 16. 18. 1 Atk. 9. 9 Mod. 172. 1 Wils. 74. Watk. Desc. 136, 137.]—[Ed.]

(p) It may be further observed, that, as the renewal of a lease is considered as a *new acquisition*, the person renewing becomes a purchaser, and the descent is thereby altered. *Mason v. Day*, Prec. in Ch. 319. *Peirson v. Shore*, 1 Atk. 480. 3 Cru. Dig. 397.—[Ed.]

made a feoffment in fee of *parcel to hold of him by rent and service, (172)*
 albeit they be newly created, yet for that they are parcel of the manor,
 they shall with the rest of the manor descend to the heir of the part
 of the mother, *quia multa transeunt cum universitate quæ per se*
non transeunt. If a man hath a rent-seck of the part of his mother,
 and the tenant of the land *granteth a distress to him and to his
 heirs, and the grantee dieth, the distress shall go with the rent to
 the heir of the part of the mother, as incident or appurtenant to
 the rent, for now is the rent-seck become a rent-charge (22). *13 a.

(r) A man so seised as heir on the part of his mother maketh a
 feoffment in fee to the use of him and his heirs, the use being a
 thing in trust and confidence shall ensue the nature of the land (23),
 and shall descend to the heir on the part of the mother. (s) A man
 hath a seignory as the heir of the part of his mother, and the tenancy
 doth escheat, it shall go to the heir of the part of the mother. If the
 heir of the part of the mother of land whereunto a warranty is
 annexed is impleaded and vouch, and judgment is given against him,
 and for him to recover in value, and he dieth before execution (t),
 the heir of the part of the mother shall sue execution to have in
 value against the vouchee, for the effect ought to pursue the cause,
 and the recompense shall ensue the loss (q).

*If a man giveth lands to a man, to have and to hold to him and
 his heirs on the part of his mother, yet the heirs of the part of the
 (7) 5 E. 4. 4.
 1 Co. 100.
 Shelley's
 case. 27 H. 8.
 Dyer. Buck-
 enham's
 case. 32 H. 8.
 Gard. Brooke
 93. 13 H. 7. 6.
 (2) Rol. Abr.
 780. Ante,
 23 a. Post,
 271 b. 1 Co.
 127. Hob. 31.
 2 Co. 58.
 (e) 16 E. 3.
 Age 46.
 (f) Pl. Com.
 292. and 515.
 See more of
 this in the
 Chapter of
 Warranties.
 (173)*

(22) Acc. 8 Co. 54 a.—[Hargr. n. 1.
 13 a.]

(23) The better reason seems to be, that
 the use being the same as it was before the
 feoffment, it is the old use which continues.
 As to the use's ensuing the nature of the
 land, see 1 Co. 127. 2 Co. 58. and Bac.
 Read. on Stat. Uses, 8vo. ed. 308. in which
 latter book the author controverts the *gene-
 rality* of the doctrine, which certainly ought
 to be understood with many restrictions, and
 considers at large the differences between
uses and the *land* itself, or rather, as he ex-
 presses himself, between *uses* and cases of
 possession. Lord Bacon's Reading on the
 Statute of Uses is a very profound treatise

on the subject, so far as it goes, and shows
 that he had the clearest conception of one of
 the most abstruse parts of our law. What
 might we not have expected from the hands
 of such a master, if his vast mind had not so
 embraced within its compass the whole field
 of science, as very much to detach him from
 professional studies? It may be proper to
 observe, that all the editions of Lord Bacon's
 Reading on Uses are printed with such ex-
 treme incorrectness, that many passages are
 rendered almost unintelligible, even to the
 most attentive reader. A work so excellent
 deserves a better edition.—[Hargr. n. 2.
 13 a. (64).]

(q) A trust estate is descendible in the same manner as a legal one; so where a trust
 estate descends from the mother, it will go to the heirs *ex parte materna*. But where the
 legal estate descends *ex parte materna*, and the trust estate *ex parte paterna*, or *vice versa*,
 the trust estate will merge in the legal, and both will follow the line through which the
 legal estate descended. *Goodright v. Wells*, Dougl. 771. But where a person devised his
 real and personal estate to his wife in trust for the maintenance of his only daughter till she
 arrived at twenty-one; and in case of her death under twenty-one, then to his wife; it was
 held, that the daughter took a present limited fee, either by descent or by implication under
 the will, upon the contingency of her dying under twenty-one; and that the mother took an
 executory devise in fee, which, upon her death before the daughter attained twenty-one,
 descended to the daughter; and that the daughter afterwards dying before she attained
 twenty-one, such executory interest, which did not unite with, nor was merged in the fee
 which she had *ex parte paterna* during her life, descended to her heirs *ex parte materna*.
Goodtitle, d. Vincent v. White, 15 East, 174. 2 N. R. 383.—[Ed.]

(Aile, 27 a.)

father shall inherit, for no man can institute a new kind of inheritance not allowed by the law, and the words (of the part of his mother) are void (R), as in the case that Littleton putteth in this chapter. If a man giveth lands to a man to him and his heirs male, the law rejecteth this word male, because there is no such kind of inheritance, whereof you shall read more in its proper place.

(u) 38 E. 3. 12.

A man hath issue a son, and dieth, and the wife dieth also, lands are letten for life, the remainder to the heirs of the wife, the son dieth without issue, the heirs of the part of the father shall inherit, and not the heirs of the part of the mother, because it vested in the son as a purchaser. And the rule of Littleton holdeth as well in other kind of inheritances, as in lands and tenements. (u) And therefore if there be lord, feme mesne, and tenant, and the mesne bind herself and her heirs by her deed to the acquittal of the tenant, the mesne take husband, the tenant by his deed granted to the husband and his heirs, that he or his heirs shall not be bound to acquittal, the husband and wife have issue, and die, this issue, being bound as heir to his mother, shall not take benefit of the said grant of discharge, for that extends to the heirs of the part of the father, and not to the heirs of the part of the mother, and therefore the heir of the part of the mother was bound to the acquittal (24). And thus much, for the better understanding of Littleton's cases concerning the heir of the part of the mother, shall suffice (25).

(174)*
13 b.
(*) Sect. 147.
149. 248. 250.
417. 657, &c.

"*And so see, &c." This kind of speech is often used by our author, and doth ever import matter of excellent observation, which you may find in the sections noted in the margin (*).

LITTLETON.
[Sect. 5.
13 b.]
Right of pri-
mogeniture.

ALSO, if there be three brethren, and the middle brother purchaseth lands in fee-simple, and die without issue, the elder brother shall have the lands by descent, and not the younger (26), &c. And also if there be three brethren, and the youngest purchase lands in fee-simple, and die without issue, the eldest brother shall have the land by descent, and not the middle, for that the eldest is most worthy of blood.

(24) "Nota, it was grant and release; but *ratio libri* is, because the husband was not charged, except during the coverture, and by reason of that the discharge doth not extend farther." Hal. MSS.—[Hargr. n. 3. 13 a. (65).]

(25) "7 H. 6. 3. by Cottesmore. If lord takes tenant to wife, and dies having issue, which dies without issue, the seignory is revived, and the tenancy shall go to the heir of the part of the mother." Hal. MSS.—[Hargr. n. 4. 13 a. (66).]

(26) "But if the land purchased by the middle brother was holden of the elder brother, who accepts homage of him, the land

shall descend to the younger brother by 13 E. 1. Avowry 235." Hal. MSS.—[Hargr. n. 3. 13 b. (72).]

[This distinction was a consequence of the feudal maxims *quod nemo potest esse tenens et dominus, et homagium repellit perquisitum*. The feudal law had a peculiar aversion at joining again the property and superiority in one person, when they had been once disjointed. The whole system was built on the distinct rights of superior and vassal; and the blending these two characters in one person, appeared to be the blending of contrary qualities together. Dalrym. F. P. c. 5. p. 208.]—[Ed.]

(R) See Dougl. 773.—[Ed.]

Now cometh our author to the descent between brethren, which he purposely omitted before. 13 b.

“*The eldest is most worthy of blood* (s).” It is a maxim in law, that the next of the worthiest blood shall ever inherit, as the male and all descendants from him before the *female, and the female of the part of the father before the male or female of the part of the mother, &c. because the female of the part of the father is of the worthiest blood. (w) And therefore among the males the eldest brother and his posterity shall inherit lands in fee-simple as heir, before any younger brother, or any descending from him, because (as Littleton saith) he is *most worthy of blood*. *Quod prius est dignius est*, and *qui prior est tempore potior est jure*. *Si quis plures filios habuerit, jus proprietatis primò descendit ad primogenitum, ed quod inventus est primò in rerum naturâ*. In king Alfred’s time knights’ fees (27) descended to the eldest son, for that by division of them between males the defence of the realm might be weakened; but in those days socage fee was divided between the heirs male, and therewith agreeth Glanvill. (*) *Cùm quis hæreditatem habens moriatur, &c. si plures reliquerit filios, tunc distinguitur utrùm ille fuerit miles, sive per feodum militare tenens, aut liber sockmannus, quia si miles fuerit aut per militiam tenens, tunc secundum jus regni Angliæ primogenitus filius patri succedit in toto, &c. si vero fuerit liber sockmannus, tunc quidem dividetur hæreditas inter omnes filios, &c.* (28). But hereof more shall be said hereafter in his proper place. 14 a.

(175)*
(w) Britton, cap. 119.
Bract. lib. 2 cap. 30. 277.
29. 3 E. 3. 26. 3 Ellis.
Dyer 133.
Stanford præf. 52. 53.
3 E. 1. tit. Avowry 226.
32 E. 3. De-
cent. 50.
Bra. lib. 4. 211.
Fleta, lib. 6. ca. 2.
Glanvil. lib. 7. ca. 1. Mir-
ror, ca. 1. sect. 3.

(*) Glanvil. lib. 7. ca. 3. & ca. 1. Vid. Pl. Com. 229 b.

(27) Here Lord Coke writes, as taking it for granted, that feudal tenures subsisted in England before the Conquest. But this is a controverted point amongst our best writers. See ante, 64 a. where a note is given on this subject. (Ant. vol. 1. p. 244. n. 3.) —[Hargr. n. 1. 14 a.]

(28) See in Robins. Gavelk. an elaborate dissertation on the origin, antiquity, and universality of partible descents. The au-

thor pursues his subject amongst the Jews, Greeks, and Romans, and afterwards amongst most of the modern nations in Europe, and then proceeds to inquire into the state of our own law of descents before the Conquest. See page 20. See also Lord Hale’s learned researches into the history of the law of descents in his Hist. of the C. L. c. 11. p. 206. —[Hargr. n. 2. 14 a. (73).]

(s) By the law of England, without a special custom to the contrary, where there are two or more males, in equal degree, the eldest only shall inherit, but the females altogether. 2 Hal. Hist. c. 11. p. 119. 2 Bl. Com. 214. Ant. 164 a. vol. 1. p. 682. 685. This right of primogeniture in males seems anciently to have obtained only among the Jews: the Greeks, Romans, Britons, and Saxons, and even originally the feudists divided the lands equally; some among all the children at large, some among the males only. 2 Bl. Com. 214, 215. But though upon the first introduction of hereditary succession in feuds they descended to all the sons, yet that course was afterwards changed in consequence of a constitution of the Emperor Frederick. The doctrine of primogeniture was first introduced into England by William the Conqueror. Ant. 64 a. n. (3) vol. I. p. 244. It appears from Glanvil, in the passage cited by Lord Coke a few lines below, that in the reign of Henry the Second, estates held by military service descended to the eldest son only; and estates held in socage were partible among all the sons, Glanvil, lib. 7. c. 3; and the right of primogeniture seems to have been fully established in the reign of Henry the Third in socage lands, as well as in lands held by knight-service. Bract. 64 b. As to the females, they are still left as they were by the ancient law; for as they were all equally incapable of performing any military service, there could be no reason for preferring the eldest. 2 Bl. Com. 216.—[Ed.]

LITTLETON.
[Sect. 6.
14 a.]
Exclusion of
the half-
blood.

ALSO, it is to be understood, that none shall have land of fee-simple by descent as heir to any man, unless he be his heir of the whole blood. For if a man hath issue two sons by divers venters, and the elder purchase lands in fee-simple, and die without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cousin, shall have the same, because the younger brother is but of half blood to the elder (29).

(176)*

14 a.

(c) Bracton,
lib. 4. Idem.
lib. 2. fol. 65.
Britton, cap.
119. Fleta,
lib. 6. ca. 1.
1 E. 3. 19.
John Gifford's
case. 31 E. 3.
Conterpl. de
Voucher 83.
40 Ass. 6.
4 E. 2.
Formd. 49.
Vid. Rat-
cliffe's case.
3 Co. 40. 41.
(1) Rol. Abr.
629.)
(q) 7 E. 4. 15.
Sect. 737.

*No man can be heir to a fee-simple by the common law, (x) but he that hath *sanguinem duplicatum*, the whole blood, that is, both of the father and of the mother, so as the half blood is no blood inheritable by descent (30); because that he that is but of the half blood cannot be a complete heir, for that he hath not the whole and complete blood (31), and the law in descents in fee-simple doth respect that which is complete and perfect. And this maxim doth not only hold where lands (whereof Littleton here speaketh) are claimed or demanded as heir, (y) but also in case of appeal of death: for if one brother be slain, the other brother of the half blood shall never have an appeal (albeit he shall recover nothing therein either in the realty or personalty), because in the eye of the law he is not heir to him. Also this rule extends to a warranty, as our author himself elsewhere holdeth (32).

(29) But daughters by different femes, though they cannot inherit to each other, may inherit together to their father, because the descent is *immediate* from the father. See R. Robins. Disc. on Inher. 2d ed. p. 37. and Bro. Abr. Descent, pl. 20. and 1 Ro. Abr. 627.—Hargr. n. 5. 14 a. (75).]

(30) The exclusion of the half blood by our law is variously accounted for. Sir Martin Wright considers it as a consequence of the rules established for restricting the succession to the descendants of the first feudatory, in conformity to the strict notion of feuds. See Wright's Ten. 184. where the exclusion of lineal ascent is excused on the same principle. See also Blackst. Law Tracts, v. 1. p. 213. 8vo. ed. where the feudal reason is explained more at large, though the author admits that the practice goes much further than the principle will warrant. Others there are, who insist, that the true reason why the brothers of different venters cannot inherit to each other, is the aversion our Saxon ancestors had to second marriages, which they are said to have deemed at best but a permitted fornication. But this unfavourable idea of the *rota iterata* was not peculiar to the Saxons, or any other descendants of the ancient Germans. See Tayl. Elem. Civ. L. 294.—[Hargr. n. 3. 14 a. (74).]

(31) See what is observed on Lord Coke's explanation of the meaning of the term *whole*

blood, in 1 Sid. 200. See too 1 Vent. 424. and 2 P. Wms. 667.—[Hargr. n. 4. 14 a.]

(32) "So brother of half-blood shall not have error on fine levied by the elder brother, though, if there had not been such fine, the land would descend to him." Hal. MSS. "Nota, if A. purchases a reversion expectant on an estate for life, and dies without issue, regularly his brother of the half-blood shall not be heir to him; because though when there is a mesne seisin he ought to make himself heir to him who is last actually seised; yet when there is not such a mesne seisin, he ought to make himself heir to him in whom it first vests by purchase. Yet see M. 1 Car. C. B. Cro. no. 16. *Hodgekinson and Wood*. A. having issue B. a son by one venter, and C. by another, devises to B. and the heirs male of his body, remainder to the heirs male of the body of the devisor, and to the heirs male of their bodies, remainder to the devisor's right heirs, and dies. B. dies without issue. Ruled, that C. shall take as heir male of the devisor, because it is *quasi* an entail according to Littleton, sect. 30. But it seems, that the fee shall descend to him, since it is a void devise of the fee-simple, and doth not vest by purchase in the eldest son, but by descent." Hal. MSS.—[Hargr. n. 6. 14 a. (76).]

[See Watk. Desc. 156. Fearn. Cont. Rem. 108—113.]—[Ed.]

AND if a man hath issue a son and a daughter by one venter, and a son by another venter, and the son of the first *venter purchase lands in fee and die without issue, the sister shall have the land by descent, as heir to her brother (33), and not the younger brother, for that the sister is of the whole blood of her elder brother (τ).

LITTLETON.
[Sect. 7.
14 a.]
(177)*

This is put for an example to illustrate that which hath been *said, and needeth no explanation. And herewith agreeth Britton.

14 a.
Britton, cap.
119.

AND also, where a man is seised of lands in fee-simple, and hath issue a son and daughter by one venter, and a son by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the land, and not the younger son; yet the younger son is heir to the father, but not to his brother. But if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter, and shall have the land as heir to his father. But where the elder son in the case aforesaid enters after the death of his father, and hath possession, there the sister shall have the land; because *possessio fratris de feodo simplici facit sororem esse hæredem*. But if there be two brothers by divers venters, and the elder is seised of land in fee, and die without issue, [and his uncle enter as next heir to him, who also dies without issue (34),] now the younger brother may have the land as heir to the uncle, for that he is of the whole blood to him, albeit he be but of the half blood to his elder brother.

*14 b.
LITTLETON.
[Sect. 8.
14 b.]
Rule of possession fratris.

(2) "*Possessio fratris de feodo simplici facit sororem esse hæredem*." Hereupon four things are to be observed, every word almost being operative and material. First, that the brother must be in actual possession; for *possessio est quasi pedis positio*. Secondly, *de feodo simplici* exclude estates in tail. Thirdly, *facit sororem esse hæredem*. So as (a) **soror est hæres facta*, and therefore some act must be done to make her heir, and the younger son is *hæres natus* (b), if no act be done to the contrary. And albeit the words be *facit sororem esse hæredem*, yet this doth extend to the issue of the sister, &c. who shall inherit before the younger brother. Fourthly, Of dignities, whereof no other possession can be had but such as descent (as to be a duke, marquis, earl, viscount, or baron) to a man and his heirs, there can be no possession

15 b.
In what cases it holds.
(a) Bracton, lib. 2. fol. 66. and lib. 4. fol. 279. Britton, cap. 119. Fleta, lib. 6. cap. 1. 24 E. 3. 30.
(b) Rastell's case. 3 Co. 42.
(178)*
(b) Britton, cap. 119. (Cro. Cha. 601.)

(33) a *et fratre*, omitted in L. and M. and Roh.

(34) All between the brackets omitted in Roh. edit.

(τ) So, if a man has three daughters by one venter and one daughter by another venter, and dies seised of lands, and all enter, and after two of the daughters by the first venter die, the third daughter of the first venter shall be heir to them, and shall have their two parts; and the fourth daughter shall take nothing from them, because she is of the half blood. Bro. Ab. tit. Descent, 20. But sisters of the half blood, though they cannot succeed as heirs to each other, yet may succeed as the heirs of their common father, being equally his children. Ibid. Watk. Desc. 125. n. (b).—[Ed.]

of the brother to make the sister inherit, (35), but the younger brother, being heir (as Littleton saith) to the father, shall inherit the dignity inherent to the blood, as heir to him that was first created noble.

(c) 8 E. 2. 11.
49 E. 3. 12.
Ratcliffe's
case. 3 Co.
41.

"*In fee-simple.*" (c) For half blood is not respected in estates in tail (v), because that the issues do claim in by descent *per formam doni*, and the issue in tail is ever of the whole blood to the donee (36).

14 b.
(d) 24 E. 3.
24. 30. 31 E.
3. Count. de
Vouch. 88.
22 E. 3. tit.
Voucher.
27 Ass. p. 4.
40 E. 3. 9.
42 E. 3. 10.
28 E. 3. fol. 12.
7 H. 5. 2.
(1 Rol. Abr.
627.)
(Cro. Cha.
411. Post.
251.)
(3 Co. 40. 41.)
(e) 8 E. 4.
fol. 7. Pl.
Com. fol. 58.
in Wim-
ble's case.
(179)*

"*Seised of lands in fee-simple.*" These words exclude a seisin in fee-tail, albeit he hath a fee-simple expectant (d) (37). And therefore if lands be given to a man and his wife, and to the heirs of their two bodies, the remainder to the heirs of the husband, and they have issue a son, and the wife dieth, and he taketh another wife, and hath issue a son, the father dieth, the eldest son entereth, and dieth without issue, the second brother of the half blood shall inherit; because the eldest son by his entry was not actually seised of the fee-simple, being expectant, but only of the estate tail (38). And the rule is, that *possessio fratris de feodo simplici facit sororem esse hæredem*, and here the eldest son is not possessed of the fee-simple, but of the estate tail (39). And where Littleton speaketh only of lands, (e) yet there shall be **possessio fratris* of an use (40), of a seignory, a rent, an advowson (41), and other hereditaments.

What seisin
is necessary.
(f) 10 Ass.
27. 34 Ass. 10.
31 E. 3.
Count. de
Vouch. 88.
22 E. 3. tit.
Vouch. 94.
*15 a.
(g) 11 H. 4.
11. 40 E. 2. 30.
45 E. 3. 12.

"*And the eldest son doth enter.*" (f) These words are materially added when the father dies seised of lands in fee-simple, for if the eldest son doth not in that case enter, then without question the youngest son shall be heir, because, as it hath been said before, regularly he must make himself heir to him that was last actually seised (or to the purchasor); and that was to the father where the eldest son did not enter. And therefore Littleton addeth, that the son is heir to the father. (g) But when the eldest son in this case

(35) See Hargr. n. 3. 15 b. (86) ante, vol. 1. p. 114. n. 12.

(36) "8 E. 3. 11. 12 E. 4. 19. 49 E. 3. 12. 4 E. 2. Formedon 49." Hal. MSS.—(Hargr. n. 2. 15 b.)

(37) "7 H. 4. 16. Vid. 38 Ass. 8." Hal. MSS.—(Hargr. n. 2. 14 b.)

(38) Acc. Bro. Abr. *Descent*, pl. 13. 14. and 30. *Seire Fucias*, pl. 126. and Execution 67. 1 Rol. Abr. 628. and see 1 Show. 245. and 3 Mod. 257.—[Hargr. n. 3. 14 b.]

(39) "Yet the remainder was in the elder brother to give or forfeit. 24 E. 3. 30." Hal. MSS.—[Hargr. n. 14 b. (77).]

(40) See Dy. 10 b. 11 a. Finch, 8vo. ed. 21. and 2 And. 146. Note, that Lord

Coke must be understood to mean uses before the statute for transferring uses into possession, or uses not executed by the statute; for uses within the statute are legal estates.—[Hargr. n. 5. 14 b. (78).]

[The doctrine of half blood is now applied to trusts as fully as to legal estates. 3 Cru. Dig. 418.—[Ed.]

(41) "So of a copyhold before admittance. 4 Co. 22 b." Hal. MSS. See acc. Dy. 291 b. Finch, 8vo. ed. 21.—[Hargr. n. 6. 14 b. (79).]

[For it is the entry and not the admittance which makes a *possessio fratris* of copyholds. See *Fox v. Smith*, 1 Freem. 45. Watk. Desc. 52 n. 63 n.]—[Ed.]

(v) So in *Doe d. Gregory v. Wichelo*, 8 T. R. 211. it was held, that the rule of *possessio fratris* does not apply to estates tail; nor even to inheritances in fee-simple, without an actual possession of the brother of the whole blood.—[Ed.]

doth enter, then cannot the youngest son, being of the half blood, be heir to the eldest, but the land shall descend to the sister of the whole blood. Yet in many cases, albeit the son doth not enter into lands descended in fee-simple, the sister of the whole blood shall inherit; and in some cases where the eldest son doth enter, yet the youngest brother of the half blood shall be heir.

40 Ass. p. 6.
Ratcliffe's
case, 3 Co. 41.

(h) If the father maketh a lease for years, and the lessee entereth, and [the father (*)] dieth, the eldest son dieth during the term before entry or receipt of rent, the youngest son of the half blood shall not inherit, but the sister (42); because the possession of the lessee for years is the possession of the eldest son, so as he is actually seised of the fee-simple, and consequently the sister of the whole blood is to be heir (43). The same law it is, if the lands be holden by knight-service, *and the eldest son is within age, and the guardian entereth into the lands. And so it is, if the guardian in socage (w) enter (44).

Where the
sister shall
inherit
though there
was no entry.
(h) 5 E. 4. 7 b.
3 H. 7. 5.
8 Ass. p. 6.
45 E. 3. th.
Releases 22.
(Post. 243.
Mo. 125.
3 Co. 43, 41.)
(180)*

(*) The words placed within brackets are not in the original, but are inserted by the editor, as necessary to the sense of the passage.

(42) Adj. acc. Mo. 125. But it is said to be otherwise, if the lease is of a copyhold, unless made by *surrender*. 3 Leon. 69. and 4 Leon. 38.—[Hargr. n. 2. 15 a. (80).]

(43) "Yet in pleading, it shall not be said *seisin in dememe*. Defendant avows, because I. S. was seised in his *dememe* of fee and granted rent; plaintiff replies, that a long time before the said I. S. leased to him for years. It is not a plea without travers-

ing the *seisin in dememe*. T. 9 Car. B. R. *Weedon's case*." Hal. MSS.—[Hargr. n. 3. 15 a. (81).]

(44) "See accordingly, though the lord seise the land in socage as guardian in chivalry. 11 Ass. 6. 34 Ass. 10. See 13 Eliz. Dy. 292. so as to copyholder or tenant at will. Quere of tenant by sufferance." Hal. MSS.—In Jenk. 242. it is said, that the entry of a devisee for years will make a *possessio fratris*. See Vin. Abr. *Descent*, K. pl. 34. See further on this subject in the case of *Newman and Newman*, 3 Wils. 516.—[Hargr. n. 4. 15 a. (82).]

(w) The possession of a guardian in socage is the possession of the ward; who thereby acquires an actual seisin without entry. And where a posthumous son is born, and his mother is in possession of the lands whereof his father died seised, she becomes his guardian in socage; and the infant son will be thereby deemed to be actually seised of the inheritance, so as to exclude the half blood. *Goodtitle d. Newman v. Newman*, 3 Wils. 516. So in a late case it was held, that an entry by a mother, as guardian in socage, gave a sufficient seisin to an infant to exclude the heir of the half blood. *Doe v. Keene*, 7 T. R. 386. and see *Doe d. Andrew v. Hutton*, 3 Bos. & B. 643. So the entry of one coparcener, joint-tenant, or tenant in common, is sufficient to make *possessio fratris* in the others who did not enter, to the exclusion of the half blood. Hob. 120. Moor. 668. 546. Et vid. 1 Ld. Raym. 623. 5 Burr. 2607. Post, 373 b. So the entry of a younger brother or sister (although they are but of the half blood), is the possession of the eldest brother, or other sisters. Gilb. Ten. 28. 158. Plowd. 306 a. Fitz. N. B. 166. (L) p. 455. n. (a). Bull. N. P. 102. Jenk. Cent. 242. pl. 25. And it seems, that such entry will make *possessio fratris vel sororis* in the heir at law, even though it be to the exclusion of the very person who enters. Jenk. Cent. 242. pl. 25. Ibid. 42. pl. 79. Plowd. 306. So it seems, that the entry of a person properly deputed will be sufficient to give an actual seisin, and make a *possessio fratris* in him by whom he is so deputed. Watk. Desc. 57. It has been said, that the rule of *possessio fratris*, is not much favoured, 3 Wils. 520. *Per* Gould and Blackstone, Js. Et vid. *De Grey v. Richardson*, 3 Atk. 471. *Cunningham v. Moody*, 1 Ves. 177. *Couper v. Earl Couper*, 2 P. Wms. 735, 736; and it is always presumed, that a person claiming is of the whole blood, till the contrary be shown. Kitch. 225 a. Plowd. 77 a. T. 19. H. 8. pl. 6. fol. 11 b. Watk. Desc. 58. n. (u). However, an ingenious author on the law of inheritances, conceives, that, in all cases, where the heir exercises any act or dominion over the inheritance (as by repairing houses, fences, &c. or by

But in the case aforesaid, if the father make a lease for life, or a gift in tail, and dieth, and the eldest son dieth in the life of tenant for life or tenant in tail, the younger brother of the half blood shall inherit; because the tenant for life or tenant in tail is seised of the freehold, and the eldest son had nothing but a reversion expectant upon that freehold or estate tail, and therefore the youngest son shall inherit the land as heir to his father, who was last seised of the actual freehold. And albeit a rent had been reserved upon the lease for life, and the eldest son had received the rent and died, yet it is holden by some (*) that the younger brother shall inherit, because the seisin of the rent is no actual seisin of the freehold of the land. But 35 Ass. pl. 2. *seemeth to be contrary, because the rent issueth out of the land, and is in lieu thereof (45), wherein the only question is, whether such a seisin of the rent be such an actual seisin of the land in the eldest son as the sister may in a writ of right make herself heir of this land to her brother. But it is clear, that (i) if there be bastard *eigne* and *mulier puisne*, and the father maketh a lease for life or a gift in tail, reserving a rent, and die, and the bastard receive the rent and die, this shall bar the *mulier*, for the reason of that standeth upon another maxim, as shall manifestly appear in his apt place, sect. 399.

(*) 7 H. 5. 24.
per Halls &
Lodgington.
35 Ass. p. 2.
(181)*

(i) 14 E. 2.
Bastard 26.
Vid. sect. 399.

(Post, 244 a.)

Entry into
part suffici-
ent.

21 H. 7. 32 a.

"*Enter.*" Hereupon the question groweth, whether if the father be seised of divers several parcels of land in one county, and after the death of the father the son entereth into one parcel generally, and before any actual entry into the other dieth, this general entry into part shall vest in him an actual seisin in the whole, so as the sister shall inherit the whole. And this is a *quære* in 21 H. 7. 33 a. (46).

15 b. And some do take a diversity when an entry shall vest, or devest an estate, that there must be several entries into the several parcels, but where the possession is in no man, but the freehold in law is in the heir that entereth, there the general entry into one part reduceth all into his actual possession. And therefore if the lord entereth into a parcel generally for a mortmain, or the feoffor for a condition broken, or the disseisee into a parcel generally, the entry shall not vest nor devest in these or like cases, but for that parcel. But when a man dies seised of divers parcels in possession, and the freehold in law is by the law cast upon the heir, and the possession in no man, there the entry into parcel generally seemeth to vest the actual possession in him in the whole. But if his entry in that case be special,

(Post, 223 b.)

Q Leon. 265.)

(45) "*Nota*, M. 24 Car. B. R. between *Ames* and *Cooke*, ruled that in such case seisin of rent doth not make *possessio fratris*." Hal. MSS. See S. C. acc. All. 88.—S. P. adjudged acc. Trin. Term, 1657, between *Piper* and *Masters*, MS. Rep. by Glyn. J.—[Hargr. n. 5. 15 a. (83).]

[See also *Doe v. Keene*, 7 T. R. 390. acc.]—
[Ed.]

(46) "Adjudged accordingly in the point. P. 4 Eliz. B. R." Hal. MSS.—[Hargr. n. 8. 15 a.]

receiving rents), it will amount to an actual entry. Rob. Law Inherit. 33. n. (i), ch. 4. cites 1 Leon. 265, and Co. Litt. 15.—[Ed.]

viz. that he enter only into that parcel, and into no more, there it reduceth that parcel only into actual possession.

*“*A man seised of lands.*” What then is the law of a rent advowson, or such things that lie in grant? (k) If a rent, or an advowson, do descend to the eldest son, and he dieth before he hath seisin of the rent, or present to the church, the rent or advowson (47) shall descend to the youngest son, for that he must make himself heir to his father, as hath been oftentimes said before. The like law is of offices, courts, liberties, franchises, commons of inheritance, and such like. (l) And this case differeth from the case of the tenant by the curtesy, for there, if the wife dieth before the rent day, or that the church become void, because there was no laches or default in him, nor possibility to get seisin, the law, in respect of the issue begotten by him, will give him an estate by the curtesy of England. But the case of the descent to the youngest son standeth upon another reason, viz. to make himself heir to him that was last actually seised, as hath been said.

(189)*
Seisin also requisite in the case of incorporeal hereditaments.
(k) 19 E. 2. Quare imp. 177. 3 H. 7. 5.

(l) 7 E. 3. 66. tit. Bar. 293.
3 H. 7. 5.
(Ante, 29 a.)

“*Seised of lands.*” (m) But (48) in this case, if the eldest son doth enter and get an actual possession of the fee-simple, yet, if the wife of the father be endowed of the third part, and the eldest son dieth, the younger brother shall have the reversion of this third part notwithstanding the elder brother's entry; because that his actual seisin which he got thereby was by the endowment defeated (49). But if the eldest son had made a lease for life, and the lessee had endowed the wife of the father, and tenant in dower had died, the daughter should have had the reversion, because the reversion was changed and altered by the lease for life, and the reversion is now expectant, on a new estate for life (x).

16 a.
The seisin being defeated, possession fratris fallit.
(m) 7 H. 5. 2, 3, 4.

(N) Co. 35 b.
Ante, 191 b.
4 Co. 56 b.)

(47) “If it was an advowson in gross. But seisin of a manor is good seisin of advowson, common, &c. *appendant* or *appurtenant*. 18 H. 6. 24.” Hal. MSS.—[Hargr. n. 1. 15 b. (85).]

(48) See ante, 31 a. vol. 1. p. 573—575.

(49) “So it is, if father makes lease for life, and afterwards recovers against him by default, and dies, and the eldest son enters, against whom the lessee recovers *per quod*

ei de forceat. 8 Ass. 6. If wife recovers dower by erroneous judgment against the elder brother and dies, the sister shall have error; and if she reverses the judgment, she shall hold against the brother. 7 H. 5. 4. Son barred by false verdict in mort d'ancestor; the sister shall have attain and reverse the judgment; but afterwards the brother shall enter. Kelw. 119 b.” Hal. MSS.—[Hargr. n. 7. 15 a. (84).]

(x) Before the close of this chapter, it may be desirable to state the mode of tracing a title by descent. We have seen that there are two leading principles which govern this doctrine, viz. proximity of blood, and dignity of blood. And these two principles being attended to, it will not be a difficult matter to ascertain on whom the law casts the inheritance, on the death of its last possessor intestate. Suppose then J. S. dies seised of land which he acquired, and which therefore he held as a feud of indefinite antiquity:—in the first place succeeds his eldest son or his issue: and, if his line be extinct, then the second son, and the other sons respectively, in order of birth, or their issue: and in default of these, all the daughters together, or their issue. On failure of the descendants of J. S. himself, the issue of his parents, G. and L. S. is called in; viz. first the eldest brother of the whole blood, or his issue: then the second and the other whole brothers respectively, in order of birth, or their issue: then the sisters of the whole blood all together, or their issue. In defect of these, the issue of his father's parents, G. and C. S., respect being still had to

(184)*

CHAPTER XXX.

OF TITLE BY PURCHASE, AND BY ESCHEAT.

3 b. PURCHASE, is in Latin *perquisitum*, of the verb *perquirere*.
 Definition of purchase. Littleton describeth in the end of Chapter I. in this manner : "Also purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors, or of his cousins, but by his own deed." So as I take it, a purchase is to be taken, when one cometh to lands by conveyance or title ; and that disseisins, abatements, intrusions, usurpations, and such like estates gained by wrong, are not said in law purchases (1), but oppressions and injuries.

LITTLETON.
 [Sect. 12.
 18 a.] *ALSO, purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors, or of his cousins, but by his own deed (A).*

(1) Accord. ante, 2 a. (vol. 1. p. 491, 492.), and post, 18 b. [Hargr. n. 8. 3 b.]

their age and sex : then the issue of his paternal grandfather's parents W. and C. S. : then the issue of his paternal grandfather's father's parents R. and A. S. : and so on in the paternal grandfather's paternal line, or blood of W. S. in *infinitum*. When all the representatives of the male stock of the paternal line are extinct, then the female stock of the paternal line in like manner succeeds ; beginning, according to the doctrine laid down by Justice Manwoode in *Clere* and *Brooke* (Plowd. 450.), and adopted by Lord Bacon (Elem. c. 1.), Sir Matthew Hale (H. C. L. 240. 244.), and Lord Ch. B. Gilbert (Ten. 19.), with the heirs of the paternal grandmother, in preference to the heirs of the paternal great-grandmother, the former being equal in dignity of blood to the latter, and nearer, in point of proximity of blood, to the *propositus*. And though this doctrine has been controverted by Sir William Blackstone (2 Com. 238. 240.), it has since met with very able supporters, whose arguments and reasoning on the subject have, we think, the most weight. See Remarks on the Law of Descents by William Osgoode, Esq. of Lincoln's Inn, published in 1779. 2 Woodd. 262. 3 Cru. Dig. 425. In default of the male and female stocks of the paternal line of J. S., recourse must then, and not before, be had to his maternal relations, in the same regular successive order as in the paternal line. But in case J. S. was not himself the purchaser, but the estate in fact came to him by descent from his father, mother, or any higher ancestor ; then the blood of that line of ancestors, from which it did not descend, can never inherit ; as was fully explained in a former part of this chapter. Ant. 12 a. p. 169. The student should also bear in mind, that in the above process of tracing the heir of J. S., J. S. is the person supposed to have been last actually seised of the estate. For if ever it comes to vest in any other person, as heir to J. S., a new order of succession must be observed upon the death of such heir ; since he, by his own seisin, now becomes an ancestor or *stipes*, and must be put in the place of J. S.—[Ed.]

(A) The feudal writers called purchase *conquestus*, or *conquisitio*, both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland, Dalrym. F. P. p. 210. ; as it was among the Norman jurists, who styled the first purchaser (that is, he who brought the estate into the family which at present owns it) the conqueror or *conquereur*, Gr. Coustum. Gloss. c. 25. p. 40. : and Glanvil (lib. 7. c. 1.) uses the word *questus* to denote the property which a person has acquired by his own act, and not by descent. Infra. 18 b.

The difference between the acquisition of an estate by descent, and by purchase, consists principally in two points : 1st. That, by purchase, the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity ; whereby it becomes inheritable to his heirs general, first of the paternal, and then of the

*Purchase, in Latin, is either *acquisitum*, of the verb *acquirō*, (185)*
for so I find it in the original Register, 234. *In terris vel tene-*
*mentis, quæ *viri et mulieris conjunctim acquisiverunt, &c.* 18 a.
Bracton calleth it *perquisitum*; and by Glanvill (a) it is called
quaestus or *perquisitum*. *18 b.

Bract. lib. 2.
fol. 65.
(a) Glanv. ii.
7. ca. 1. Briu.
ca. 45. fol. 84.
& 131. (1) Rol.
Abr. 827.)

A purchase is always intended by title, and most properly by
some kind of conveyance, either for money or some other considera-
tion, or freely of gift; for that is in law also a purchase (2). But a
descent, because it cometh merely by act *of law, is not said to be (186)*
a purchase; and accordingly the makers of the act of parliament in

The different
kinds.

(2) In Plowd. 11. Saunders *arguendo*
says, that one may have land by purchase
three ways, by bargain or gift for money, by
gift without any recompense, and by way of
remainder.—[Hargr. n. 1. 18 b. (105).]

[And if the ancestor devises his estate to
his heir at law by will with other limitations,
or in any other shape than the course of de-
scents would direct, such heir shall take by
purchase. 2 Bl. Com. 241, *Swaine v. Bur-*
ton, 15 Ves. 371. Thus, if a man, having
two daughters his heirs, devises his lands to
them and their heirs, and dies; they shall
take by purchase as joint-tenants; for the es-
tate of joint-tenants, and tenants in common,
is different as to its nature and quality from
that of coparceners. Cro. Eliz. 431. But
if a man, seised in fee, devises his whole es-
tate to his heir at law, so that the heir takes
neither a greater nor a less estate by the de-
vice than he would have done without it, he
shall be adjudged to take by descent, (1 Rol.
Abr. 626.), even though it be charged with
incumbrances, Salk. 241. Ld. Raym. 723;
this being for the benefit of creditors and
others, who have demands on the estate of
the ancestor. 2 Bl. Com. 242.

If a remainder be limited to the heirs of
A., here A. himself takes nothing; but if he

dies during the continuance of the particular
estate, his heirs shall take as purchasers.
1 Rol. Abr. 627. But if an estate be made
to A. for life, remainder to his right heirs in
fee, his heirs shall take by descent; for it is
an ancient rule of law, that wherever the an-
cestor takes an estate for life, the heir cannot
by the same conveyance take an estate in
fee by *purchase*, but only by *descent*. *Shel-*
ley's case, 1 Co. 104. Et vid. 2 Lev. 60.
Raym. 334. Ante, p. 143. n. (F). And if A.
dies before entry, still his heir shall take by
descent, and not by purchase; for where the
heir takes any thing that might have vested
in the ancestor, he takes by way of descent.
1 Co. 98. The ancestor, during his life,
bears in himself all his heirs, ante, 22 b.
p. 142; and, therefore, when once he is or
might have been seised of the lands, the in-
heritance so limited to his heirs, vests in the
ancestor himself: and the word "heirs," in
this case is not esteemed a word of *purchase*,
but a word of *limitation*, enuring, so as to in-
crease the estate of the ancestor from a te-
nancy for life to a fee-simple. 2 Bl. Com.
242. Ante, 376 b. p. 143. See further as
to the distinction between words of purchase
and words of limitation, in Watk. Deso. 155.
et seq.]—[Ed.]

maternal line. 9dly. An estate taken by purchase will not make the person who acquires
it answerable for the acts of his ancestor, as an estate by descent will. For, if the ancestor
by any deed, obligation, or covenant, binds himself and his heirs, and dies; this deed, obli-
gation, or covenant, shall be binding upon the heir, so far only as he (or any other in trust
for him, stat. 29 Car. 11. c. 3. s. 10.) had any estate of inheritance vested in him by descent
from, or any estate *pur autre vie* coming to him by special occupancy, as heir to (Ibid.
s. 12.) that ancestor, sufficient to answer the charge, 1 P. Wms. 777; whether he remains
in possession, or has aliened it before action brought, stat. 3 & 4 W. & M. c. 14; which
sufficient estate is in law called *assets*, from the French word *ussez*, enough. 2 Bl. Com.
242, 243, 244. And by stat. 49 Geo. 3. c. 74. where a person, being at the time of his
death a trader within the meaning of the bankrupt laws, dies seised or entitled to real es-
tate, which he shall not by his last will have made subject to the payment of his debts,
and which before the passing of this act would have been assets for the payment of his
debts by specialty, in which the heirs were bound, the same shall be assets in the hands of
the heir, or devisee, to be administered in equity for payment of all his debts, whether by
simple contract or by specialty; creditors by specialty, in which the heirs are bound, to be
first paid.—[Ed.]

Pl. Com.
Wimbishey's
case, 47 b.
1 H. 5. cap. 5.

1 H. 5. c. 5. speak of them that have lands or tenements by purchase or descent of inheritance. And so it is of an escheat or the like, because the inheritance is cast upon, or a title vested in the lord by act in law, and not by his own deed or agreement, as our author here saith (3). Like law of the state of tenant by the curtesy, tenant in dower, or the like. But such as attain to lands by mere injury or wrong, as by disseisin, intrusion, abatement, usurpation, &c. cannot be said to come in by purchase, no more than robbery, burglary, piracy, or the like, can justly be termed purchase (4).

LITTLETON.
[Sect. 9.
16 a.]
The word
"inherit-
ance" appli-
cable to in-
heritable pro-
perty acquir-
ed by pur-
chase, as
well as by
descent.

(187)*

AND it is to wit, that this word (inheritance) is not only intended where a man hath lands or tenements by descent of inheritance, but also every fee-simple or tail (5) which a man *hath by his purchase may be said an inheritance, because his heirs may inherit him. For in a writ of right which a man bringeth of land that was his own purchase, the writ shall say, quam clamat esse jus et hæreditatem suam. And so shall it be said in divers other writs which a man or woman bringeth of his own purchase, as appears by the Register.

(b) Sect. 732.
Bract. lib. 2.
fol. 62 b.
Fleta, lib. 6.
cap. 1. (Post,
388 b.)

"Quam clamat esse jus et hæreditatem suam." (b) Here our author declareth the right signification of this word (inheritance). And true it is, that in the writ of right patent, &c. *quando dominus remittit curiam suam*, the words of the writ be, *quam clamat esse*

(3) "The abbot of Fountains of the order of Cistercians before the council of Lateran makes a feoffment, and the land escheats to him after the council of Lateran. It seems that he shall not be charged with tithes, because it is not a purchase. *Quære*, M. 7 Jac. B. R. *Dickson and Waller*." Hal. MSS. It was decreed by the general council of Lateran in 1215, that the privilege of exemption from tithes, enjoyed by the Cistercians and other religious orders, should not extend to lands purchased after that council. *Ne occasione privilegiorum suorum ecclesie ulterius prægraventur, decernimus, ut de alienis terris et a modo acquirendis, &c. decimas persolvant, &c.* Gibs. Cod. 1st ed. 2 vol. p. 700, 701. This explains the case cited by Lord Hale.—An escheat in appearance participates of the nature both of a purchase and a descent; of the former, because some act by the lord is requisite to perfect his title, and the actual possession of the land cannot be gained till he enters or brings his writ of escheat; of the latter, because it follows the nature of the seignory, and is inheritable by the same persons. But strictly speaking an escheat is a title neither by purchase nor descent. It should be considered, that though the lord must do some act to put himself into the actual possession; yet his title to take possession commences immediately on the want of a tenant, and this title is vested in him without waiting for his own deed or agreement,

and as much by mere act of law as the title of an heir is in the case of a descent; and therefore both titles are equally excluded from being purchases. On the other hand, escheat is not a title by descent; for the lord takes in his capacity of lord of the seignory of which the land escheated was holden, and not as heir, or by right of blood. Nor is it any objection to this way of considering the title by escheat, that the land escheated will be inheritable in the lord as land by purchase, where he has the seignory by purchase, and as land by descent, where he has the seignory by descent; for the reason of this is, not that the escheat is either a purchase or descent, but because the escheat follows the seignory, from which the right to it is derived, as an accessory to its principal. According to this view of the subject, instead of distributing all the several titles to land under purchase and descent, it would be more accurate to say, that the title to land is either by purchase, to which the act or agreement of the party is essential, or by mere act of law, and under the latter to consider first descent, and then escheat, and such other titles not being by descent, as yet like them accrue by mere act of law. See on this subject Blackst. Comment. ed. 5. v. 2. p. 24 k. and 201.—[Hargr. n. 2. 18 b. (106).]

[See ant. p. 156. n. (d).]—[Ed.]

(4) See acc. ant. 3 b. p. 184.

(5) *ou tail*, not in L. and M.

jus et hæreditatem suam. And in the *præcipe in capite*, in a *cui in vita*, (c) when the defendant claimeth by purchase, the writ is, *quam clamat esse jus et hæreditatem suam.* And with Littleton agreeth Register fol. 4. and 232, and the book in 49 E. 3. 22. against sudden opinions. 7 H. 4. 5. 10 H. 6. 9. 39 H. 6. 38. Pl. Com. Wimbeshes's case, 47. And yet in 7 H. 4. 5., which is the book of the greatest weight, Sir William Thirning, chief justice of the common bench (as it seemeth doubting of it), went into the chancery, to inquire of the chancery men of the form of the writ in that case; and they said that the form was both the one way and the other, so as thereby the opinion of Littleton is confirmed, and the book in 6 E. 3. fo. 30. is notable; for there in an action of waste the plaintiff supposed, that the defendant did hold *de hæreditate sua*, and it is ruled, that albeit the plaintiff purchased the reversion, yet the writ should serve. And there it is said, it hath been seen, that, in a *cui in vita*, the writ was, *which the demandant claimed as her right and inheritance*, when it was her purchase. And so this point, wherein there might seem some contrariety in books, is manifestly cleared. But in the statute of W. 2. cap. 5., *de hæreditate uxorum*, by construction of the whole statute, is taken only for the wives' inheritance by descent, and not by purchase, as appeareth in 1 E. 2. tit. *Quare impd.* 43. 35 H. 6. 54. F.N.B. 34 b.

(c) Regist. fol. 1. 2. (F. N. B. 193.)

Regist. fol. 4. 222. 49 E. 3. 22. 7 H. 4. 5. 10 H. 6. 9. 39 H. 6. 38. 6 E. 3. 50. Pl. Com. Wimbeshes's case, 47 & 58 b.

6 E. 3. 30.

W. 2. c. 5. 1 E. 2. tit. *Quare impd.* 43. 35 H. 6. 54. F. N. B. 34 b.

"*And it is to wit.*" This kind of speech is used twice in Chapter I. and oftentimes by our author in all his three *Books, and ever teacheth us some rule of law, or general or sure leading point, as you shall perceive by reading, and observing of the same, which for the ease of the studious reader I have observed.

Sect. 45. 46. 57. 59. 80. 100. 146. 164. 170. 184. 229. 243. 258. 274. 280. 293. 300. 305. 419. 420. 421. 436. 632. 697. 743.

(188)*

(d) Escheat (6), *escheata*, is a word of art, and derived from the French word *escheat* (*id est*) *cadere, excidere* or *accidere*, and signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee escheated (b). And, therefore, of some, escheats are called *excadentiae* or *terrae excadentiales* (c). *Dominus verò capitalis loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis sui tenentis. Loco hæredis et haberi poterit nisi per modum donationis fit reversio cujusque tenementi.* And Ockam (who wrote

13 a. Definition of escheat. (d) Vid. sect. 130. Glanv. lib. 7. cap. 17. Bract. lib. 3. to 118. Flota, lib. 6. cap. 5. & lib. 3. cap. 10. Britton, cap. 37. & cap. 119. F. N. B. 100. Tr. 19 E. 1.

in Banco Rot. 23. 3 Inst. 21. 4 Inst. 225. F. N. B. 144 b.) (c) Flota, lib. 6. ca. 1. Ockam, cap. quod non absolvitur, &c.

(6) See Wright's Ten. 115. 2 Blackst. 2 Blackst. Comm. 5th ed. 241.—[Hargr. n. Law Tracts, 8vo. edit. vol. 1. p. 236. and 6. 13 a.]

(s) The doctrine of escheats was originally derived from the feudal law, and was introduced into England by the Normans. It is founded on this principle, that the blood of the person last seised in fee is, by some means or other, utterly extinct and gone: and since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence, that the Inheritance itself must fail. The land must become what the feudal writers call *feodum apertum*, and must result back to the lord of the fee, from whom, or from whose ancestor, it was originally derived. 2 Bl. Com. 245. Wright. Ten. 115. 3 Inst. 64. An escheat was, therefore, in fact, a species of reversion, and is so called and treated by Bracton. Bract. 23 a. 3 Cru. Dig. 491. Watk. Desc. 2. Supra, u. (3), p. 186. —[Ed.]

Escheat arises either by attainder of the tenant; (f) Pl. Com. Dame Hale's case. (Post 22 b.)

92 b.

See of this in the Chapter of Fee-simple, sect. 4. (1 Rol. Abr. 814. F. N. B. 144. Ante, 13 a.)

(189)*

See more of this in the Chapter of Warrantie, sect. 9

* Probably sect. 745, 746 & 747. (Note from 18th Lond. edit. 1823.) or by his death without heirs.

in the reign of Henry the Second) treating of tenures of the king, saith, *porro eschatæ vulgò dicuntur, quæ decedentibus hiis qui de rege tenent, &c. cum non existit ratione sanguinis hæres, ad fiscum relabuntur.* (f) So an escheat doth happen two manner of ways, *aut per defectum sanguinis*, i. e. for felony, and that is by judgment three manner of ways, *aut quia suspensus per collum, aut quia abjuravit regnum, aut quia utlegatus est.* And therefore, they which are hanged by martial law in *furore belli* forfeit no lands: and so in like cases escheats by the civilians are called *caduca*.

Eschaeta is derived of this word *eschier, quod est accidere*; for an escheat is a casual profit, *quod accidit domino ex eventu et ex insperato*, which happeneth to the lord by chance and unlooked for. And of this word *eschaeta* cometh *eschaetor*, *an escheator, so called, because his office is to inquire of all casual profits, and them to seize into the king's hands, that the same may be answered to the king (7).

Lands may escheat to the lord two manner of ways; one by attainder, the other without attainder. By attainder in three sorts. First, *Quia suspensus est per callum*. Secondly, *Quia abjuravit regnum* (8). Thirdly, *Quia utlegatus est* (c). Without attainder; as if the tenant dies without heir (d).

(7) See further as to *escheat* and *escheator*, cheq. chap. 10. s. 2.—[Hargr. n. 1. 92 b.] post, 13 b. and ante, 18 b. and note 2, there, (sup. p. 186. n. 3.) 4 Inst. 225. Mad. Ex-

(8) Aberration, according to the *ancient*

(c) The doctrine of escheat upon attainder, taken singly, says Sir William Blackstone, is this:—"that the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised, 3 Inst. 15 Stat. 25 Edw. 3. c. 2. s. 12.) is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In this situation the law of feudal escheat was brought into England at the conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revert in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage; in the case of treason, for ever; in the case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of escheat (2 Inst. 36.), as it would have done to the heir of the felon in case the feudal tenures had never been introduced. And the blood of the tenant being utterly corrupted and extinguished, it follows not only that all that he now has shall escheat from him, but also that he shall be incapable of inheriting any thing for the future. And there is yet another consequence of the corruption and extinction of hereditary blood, which is this: that the person attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor." 2 Bl. Com. 252, 253, 254. But this corruption of blood, which was one of the hard consequences of the feudal tenures, is now taken away by the 54 Geo. 3. c. 145. which enacts, that no attainder for felony, except in cases of high treason, petit treason or murder, shall extend to the disinheriting of any heir, nor to the prejudice of the right of any person other than the offender during his natural life only; and that it shall be lawful to every person to whom the right of interest of any lands, tenements, or hereditaments, after the death of any such offender should or might have appertained, if no such attainder had been, to enter into the same.—[Ed.]

(d) Escheats arising from deficiency of blood, whereby the descent is at an end, can

* *Haeres*, in the legal understanding of the common law, implieth, (190)*
 that he is *ex justis nuptiis procreatus*; for *haeres legitimus est*
quem nuptiae demonstrant, and is he to whom lands, tencments,
 or hereditaments, by the act of God and right of blood, do descend
 of some estate of inheritance. For, *solus Deus haeredem facere*
potest, non homo: dicuntur autem haereditas et haeres ab
haerendo, quodd est arctè insidendo nam qui haeres est, haeret;
vel dicitur ab haerendo, quia haereditas sibi haeret, licet nonnulli
haeredem dictum velint, quodd haeres fuit, hòc est, dominus ter-
rarum, &c. quae ad cum perveniunt.

7 b.
 Persons in-
 capable of
 being heirs.
 Mirr. cap. 2.
 sect. 15.
 Bract. lib. 2.
 f. 1. 62 b. Flat.
 lib. 6. cap. 1.
 & 54. & lib. 1.
 cap. 13.
 Glanvill. lib.
 7. ca. 1. & ca.
 12. & 13.
 (Ames, 287 b.)

A man cannot at this day grant lands in tail and reserve a rent 99 b.
 to his heirs, and exclude the grantor himself; for the heir cannot
 take any thing in the life of the ancestor, neither can the heir take
 any thing by descent, when the ancestor himself is secluded. But
 if a man had granted lands at the common law to hold of his heirs,
 these words "to hold of his heirs" are void, and he shall hold of
 the grantor as he held over, which he should have done, if he had
 made no reservation at all.

Vid. 15 E. 4.
 (2 Rol. Abr.
 447 contra.
 Hob. 130.
 Ante, 142.
 213 b.)
 33 E. 3. th.
 Annuity 52.
 3 Ass. Pl. 6.
 &c.

A monster which hath not the shape of mankind, cannot be heir or
 inherit any land, albeit it be brought forth within marriage; (g) but,
 although he hath deformity in any part of his body, yet if he hath
 human shape he may be heir. *Hii qui contra formam humani*
generis converso more procreantur, ut si mulier monstrosam vel
prodigiosam enixa, inter liberos non computentur. Partus
tamen cui natura aliquantulum ampliaverit vel diminuerit non
tamen superabundanter (ut si sex digitos vel nisi quatuor
*habuerit) bene debet inter liberos connumerari. * Si inutilia natu-*
ra reddidit, ut si membra tortuosa habuerit, non tamen is partus
monstruosus. Another saith, *ampliatio seu diminutio membrorum*

A monster.
 (g) Bract.
 lib. 5. fol. 427.
 438. Br.
 cap. 68. fol.
 167. & ca. 62.
 Fleta, lib. 1.
 cap. 6. (Ames,
 285 b.)
 * 8 a.

use of the word, had the effect of an attainder; because it was necessarily accompanied with the confession of a felony. But this kind of abjuration is not now in force; the privilege of sanctuary, of which it was consequential, having been taken away by a statute of James the First. See 21 Jam. c. 28. a. 7. 2 Inst. 629, and 2 Hawk. Pl. C. b. 2. c. 32. However, the word *abjuration* is still in use in our law for some purposes. For—1. Some statutes, in order to secure the *established religion*, require persons convicted of certain kinds of *recusancy* to abjure the *realm*, on pain of being adjudged guilty of a *capital felony*: and the word in this sense is similar to the ancient *abjuration*, and is attended with a like effect. 35 Eliz. c. 1. and 2. 13.—2. In order to secure the *succession of the crown* as settled at and since the Revolution,

other statutes make all persons who refuse to take the oath prescribed for abjuring the *Pre-tender* and his descendants, liable to various penalties and forfeitures; but this kind of abjuration differs both in *object* and *effect* from the ancient one. 13 W. 3. c. 6. 1 Ann. stat. 1. c. 22. 1 G. 1. stat. 2. c. 13. 6 G. 3. c. 53.—[Hargr. n. 2. 92 b. (92).]

[By stat. 31 Geo. 3. c. 32. (made for the relief of the Roman Catholics) it is enacted, that no person shall be summoned to take the oath of supremacy, or make the declaration against transubstantiation, or be prosecuted for not obeying a summons for that purpose: but this act does not appear to repeal the provisions of the 1 Geo. 1. c. 13. as to the oaths of allegiance and abjuration. See 4 Bl. Com. 116. ed. Chr.]—[Ed.]

only be in the three following cases: First, where the tenant dies without any relations on the part of any of his ancestors; secondly, where he dies without any relations on the part of those ancestors from whom the estate descended, ant. 19 a. p. 169; and thirdly, where he dies without any relations of the whole blood. 2 Bl. Com. 216.—[Ed.]

A bastard.
(A) Vid. sect.
188. 303.
Bract. lib. 2.
fol. 92. Brit.
601. Fleta,
lib. 1. cap. 5.
& lib. 6. cap.
8. Fleta, ubi
supra. 3 R.
2. Enr. Cong.
38. (1 Rol.
Abr. 825.)

non nocet. (h) A bastard cannot be heir, for (as hath been said before) *qui ex damnato coitu nascuntur inter liberos non computentur* (E). *Every heir is either a male, or female, or an hermaphrodite, that is, both male and female. And an hermaphrodite (which is also called *Androgynus*) shall be heir, either as male or female, according to that kind of the sex which doth prevail. *Hermaphrodita, tam masculo quàm fœminæ comparatur, secundum prævalescentiam sexus incalcescentis.* And accordingly it ought to be baptized. See more of this matter, section 35.

An alien.
(O) Mirror,
cap. 1. cap. 3.
sect. cap. 6.
sect. Bract.
lib. 5. fol. 415.
427.

Though made
denizen by
letters pa-
tent, yet he
cannot inher-
it:—secus if
he be natural-
ized.
Britt. fol. 29.
Fleta, lib. 6.
ca. 47. 13 E.
3. Br. 677.
25 E. 3. de na-
tis, ultra
mare. 31 E.
3. Cousinege
5. 42 E. 3. 2.
11 H. 4. 26.
14 H. 4. 19, 20.
3 H. 6. 55.
22 H. 6. 38.
9 H. 4. 7.

7 Co. 1. in Calvin's case. (Cro. Jam. 539. Godb. 275. S. Jid. 195. 201. Nov. 158. T. Jo. 10.
Vaugh. 274. 2 Sid. 23. Hardr. 224. 2 Ventr. 1.) 1 Ed. 3. 4. 6 Ed. 3. 55. 27 E. 3. 77.
3 E. 3. Discent. Bract. 64. 31 E. 1. Discent. 17. 46 E. 3. Petition 20. 26 Ass. pl. 2.
49 Ass. pl. 4. 29 Ass. pl. 11. 9 H. 5. 9.

(i) A man seised of lands in fee hath issue an alien that is born out of the king's legiance; he cannot be heir, *propter defectum subjectionis* (9), albeit he be born within lawful marriage. If made denizen by the king's letters patent, yet cannot he inherit his father or any other. But otherwise it is, if he be naturalized by act of parliament; for then he is not accounted in law *alienigena*, but *indigena*. But after one be made denizen, the issue that he hath afterwards shall be heir to him, but no issue that he had before. If an alien cometh into England and hath issue two sons, these two sons are *indigenæ*, subjects born, because they are born within the realm. And yet if one of them purchase lands in fee, and dieth without issue, his brother shall not be his heir (10); for there was never any inheritable blood between the father and them; and where the sons by no possibility can be heir to the father, the one of them shall not be heir to the other. See more at large of this matter, sect. 198 (F).

(9) But see ant. vol. 1. p. 90. n. 5.

(10) But this opinion has been since over-ruled. See ant. vol. 1. p. 91. n. 6.

(E) A bastard being *nullius filius* can neither inherit from its father nor mother, and consequently can have no heirs but his own children. And therefore if a bastard purchases land and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee. Ant. vol. 1. p. 150. n. (κ). Though the fact of the birth of a child during a lawful marriage is *prima facie* evidence of its legitimacy, ant. vol. 1. p. 139. n. (B). Et vid. *Routledge v. Carruthers*, 4 Dow. 403; yet evidence of the husband's non-access, and also evidence of any other kind is admissible to prove such issue bastard. Ant. vol. 1. p. 139. n. (B). So, on the other hand, the old rule, that posthumous children must be born within nine months, or forty weeks, has been relaxed. And the courts now consider nine months merely as the usual time, and do not decline exercising the discretion of allowing a longer space, where the opinion of physicians, or the circumstances of the case have required it. See ant. vol. 1. p. 141. n. (2). and *Foster v. Cook*, 3 Bro. C. C. 347; in which case, upon an issue directed out of chancery, a child born forty-three weeks, except one day, after the husband's death, was found to be legitimate. See further as to what children shall be deemed bastards, ant. vol. 1. p. 146; and as to *bastard eigne* and *mulier puime*, vide post, 244 a. b.—[Ed.]

(F) See ant. vol. 1. p. 89, 90, 91. and the stats. 25 Edw. 3. st. 2. 7 Ann. c. 3. 4 Geo. 2. c. 21. 13 Geo. 3. c. 21. cited in the notes there; by virtue of which statutes all persons born out of the king's allegiance, whose fathers or grandfathers were natural-born subjects, are held to be natural-born subjects, and are capable of inheriting. And by the 11 & 12 W. 3. c. 6. natural-born subjects may derive a title by descent through their parents, though aliens; but a subsequent statute enacts, that no right of inheritance shall accrue, by virtue of the last-mentioned act, to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the person last seised. Stat. 25 Geo. 2. c. 39. See ant. vol. 1. p. 90. n. (6).—[Ed.]

*If a man be attainted of treason or felony, although he be born within wedlock, he can be heir to no man, nor any man heir to him, *propter delictum*, for that by his attainder his blood is corrupted (c). And this corruption of blood is so high, as it cannot absolutely be salved and restored but by act of parliament; for albeit the person attainted obtain his charter of pardon, yet that doth not make any to be heir whose blood was corrupted at the time of the attainder, either downward or upward.

(192)* A person attainted. Though pardoned by letters patent, yet he cannot inherit: secus as to a pardon by act of parliament.

(k) As if a man hath issue a son before his attainder, and obtaineth his pardon, and after the pardon hath issue another son, at the time of the attainder the blood of the eldest son was corrupted, and therefore he cannot be heir. But if he die living his father, the younger son shall be heir; for he was not *in esse* at the time of the attainder, and the pardon restored the blood as to all issues begotten afterwards. But, in that case, if the eldest son had survived the father, the younger son cannot be heir; because he hath an elder brother which by possibility might have inherited (h): but if the elder brother had been an alien, the younger son should be heir, for that the alien never had any inheritable blood in him (11). See more plentifully of this matter, sect. 746, 747.

(k) Stanf. pl. cor. 196, 196. Bract. lib. 3. fol. 132, 133. 276. & lib. 5. fol. 374. Britton, fol. 215 b. Fleta, lib. 1. cap. 28. (Noy. 170. Finch. 8vo. ed. 207. Ante, 2b. 129. Cro. Ch. 543. 1 Sid. 196, 202. 1 Rol. Abr. 625. Cro. Jam. 539.

If a man hath issue two sons, and after is attainted of treason or felony, and one of the sons purchase land and dieth without issue, the other brother shall be his heir; for the attainder of the father corrupteth the lineal blood only, and not the collateral blood between the brethren, which was vested in them before the attainder, and each of them by *possibility might have been heir to the father; and so hath it been adjudged (12) (*). But otherwise in the case of the alien-née, as hath been said. (l) But some have holden, that if a man, after he be attainted of treason or felony, have issue two sons, that the one of them cannot be heir to the other, because they could not be heir to the father, for that they never had any inheritable blood (13) in them (14).

Attainder of the father no bar to collateral descent between the sons.

(193)*

(*) In the Exchequer. Mich. 40 & 41 Eliz. in le case de Hobby.

(d) Bract. lib. 3. fol. 130. Britton, fol. 15. Fleta, lib. 1. cap. 53. (1 Sid. 193. 1 Lev. 60. Vaugh. 274. 1 Ventr. 414.)

(11) Besides the authorities in the margin, see W. Jo. 34.—[Hargr. n. 3. 8 a.]

(12) S. P. acc. Noy. 158. 4 Leon. 5.—[Hargr. n. 4. 8 a.]

(13) The principle, on which it has been adjudged that the children of an alien may be heirs as between themselves, though not to their father, seems to reach the case of children born after their father's attainder. See the cases cited in n. 2. ante, (vol. 1. p. 91. n. 6).—[Hargr. n. 5. 8 a. (38).]

[See also ante, p. 189. h. (c). And the reason is, because the descent between brothers is immediate. *Collingwood v. Pace*, 1 Vent. 413. 3 Salk. 129. Note, that a person may inherit from one of his parents, though the other is attainted of treason or felony; for *duplicitatus sanguis* is not necessary in descents. Jenk. Cent. 1. Ca. 2. Cent. 5. Ca. 2.].—[Ed.]

(14) See 11 and 12 W. 3. c. 4, which disables persons educated in the popish religion,

(e) See n. (c) ant. p. 189.—[Ed.]

(h) So if a man has two sons, and the eldest is attainted, and then the father dies, the younger brother cannot inherit from his father; for the elder brother, though attainted, is still a brother, and no other can be heir to the father, while he is alive. But if the elder brother dies in the life-time of the father, without leaving issue (Hob. 334. Cro. Car. 435.), the younger brother will then inherit from his father, because he can derive his descent from him, without mentioning his elder brother, or claiming through him, Dyer, 48 a: and it is a general rule, that the attainder of a person who need not be mentioned in the derivation of the descent, does not prejudice, let the ancestor be never so remote. 3 Cru. Dig. 379.—[Ed.]

(m) Bracton, lib. 5. fol. 421. 430. 434. lib. 2. fol. 12. Fleta, lib. 6. cap. 39. 47. 14 H. 3. Bre. 677. 32 E. 3. Age 8. 10 E. 3. 536. 18 E. 3. 53. 13 E. 3. Ley 49. (1 Kol. Abr. 626.)
(n) Mirror cap. 1. sec. 3.

(m) One that is born deaf and dumb may be heir to another, albeit it was otherwise holden in ancient time. And so if born deaf, dumb, and blind, for in *hoc casu vitio parcitur naturali*. But contract they cannot. Idiots, lepers, madmen, outlaws in debt trespasses or the like, persons excommunicated, men attainted in a *præmunire*, or convicted of heresy, may be heirs.

(n) It is to be noted, that one cannot be heir till after the death of his ancestor. Before, he is called *haeres apparens*, heir apparent.

8 b.
(194)*
(o) Bract. lib. 2. fol. 85. Heof. p. 8. E. 1. Ro. 80. de Banco. Mirr. cap 2. sect. 18. Brit. 151 b.

In our old books and records there is mention made of another heir, viz. *haeres astrarius*, so called of *astre*, that is, *an hearth of a house; because the ancestor by conveyance hath set his heir apparent, and his family, in a house and living in his life-time, of whome Bracton saith thus : (o) *Item esto quòd haeres sit astrarius, vel quòd aliquis antecessor restituat haeredi in vitâ suâ hæreditatem, et se dimiserit, videtur, quòd nullo tempore jacebit hæreditas, et ideo quòd nec relevari possit, nec debeat, nec relevium dari.*

13 a.
To whom lands escheat.
(p) Pl. Com. in Nichol's case.

(p) The father is seised of lands in fee holden of I. S., the son is attainted of high treason, the father dieth, the lands shall escheat to I. S. *propter defectum sanguinis*, for that the father dieth without heir. And the king cannot have the land, because the son never had any thing to forfeit. But the king shall have the escheat of all the lands whereof the person attainted of high treason was seised (1), of whomsoever they were holden (15).

or professing it, from inheriting, but in respect of themselves only, if they do not conform within six months after the age of 18; and provides, that till they do conform, their protestant next of kin shall enjoy. By the same statute papists are disabled from taking lands by *purchase*, which should have been mentioned before. For cases on the construction of this statute, see 1 Stra. 267. 2 P. Wms. 3. 6. and 132. 3 P. Wms. 46. 1 Atk. 526. 528. 2 Atk. 210. 3 Atk. 155. 457. 2 Ves. 398. 1 Wils. part 1. p. 176. Rep. Cas. B. R. temp. Hardw. 149. Cas. B. R. temp. Hardw. 91. and Vin. Abr. *Devise*, I. 7. pl. 4. and 5.—[Hargr. n. 8. 8 a. (40).]

[The stat. 11 and 12 W. 3. c. 4. was repealed by the 18 Geo. 3. c. 6. so far as to permit such Roman Catholics to inherit real property, as would take the oath of allegiance prescribed in this act. The 13 G. 3. c. 32. repealed some of the other restrictions upon those who profess the Roman Catholic religion, on their taking the oath of allegiance therein prescribed; which oath, by the 43 Geo. 3. c. 30. gives the same benefits, and operates in like manner, as the oath prescribed in the 18 Geo. 3. c. 6.]—[Ed.]

(15) "A. in feoffa B. attainted of treason to the use of C. the king shall have the land discharged of the use." Hal. MSS. and *Pym's case*, M. 27 Eliz. is cited from

(1) For where a person attainted of treason dies seised of lands the superior law of forfeiture intervenes, and prevents the escheat to the lord. Ant. n. (c), p. 189.

With respect to the person to whom lands escheat, it is observable, that by the stat. 13 Cha. 2. c. 24. for changing all the ancient tenures into free and common socage, the rents and services (among which fealty is accustomedly due) are preserved to the lord: of him therefore the lands are still held, and to him they may escheat. But, if all these badges of tenure have been neglected to be preserved, and it be no longer known of whom the lands are mediately held; then the king, as the great and chief lord, shall have them by escheat: for to him fealty belongs, and of him they are certainly held by presumption of law, and without the necessity of proof. Booth, 135. *May v. Street*, Cro. Eliz. 120. 3 Cru. Dig. 496. But in a late case it was considered as doubtful, whether, at common law, upon the

*(q) In an appeal of death or other felony, &c. process is awarded against the defendant, and, handing the process, the defendant conveyeth away the land, and after is outlawed, the conveyance is good (16) and shall defeat the lord of his escheat, but, if a man be indicted of felony, and, hanging the process against him, he conveyeth away the land, and after is outlawed, the conveyance shall not in that case prevent the lord of his escheat. And the reason of this diversity is manifest: for, in the case of the appeal, the writ containeth no time when *the felony was done, and therefore the escheat can relate but to the outlawry pronounced. But the indictment containeth the time when the felony was committed, and therefore the escheat upon the outlawry shall relate to that time (17). Which cases I have added, to the end the student may conceive, that the observation of writs, indictments, process, judgments, and other entries, doth conduce much to the understanding of the right reason of the law (x).

(195)*
On attainder for outlawry in an appeal, the escheat has not relation to the time of the offence committed, so as to avoid mesne conveyances;—secus as to an indictment.
*13 b.
(g) 38 E. 3. fol. 37. 30 H. 6. 5. Bract lib. 2. tit. de Fort. Stamf. Pl. Cor. 192. and according to this diversity was it resolved in 5 E. 6. as it appeareth by my Lord Dy. Cro. Cha. 172.)

er's Manuscript. (Post, 390 b.) (W. Jo. 217. Cro. Cha. 172.)

Moore. See Mo. 196. But note, that according to Moore, B., at the time of the conveyance to him, had only committed treason, and was not attainted till *after*; and it was by *relation* to the time of committing the offence, that the case was construed to be the same as if the conveyance had been to a person actually attainted. The doctrine in *Pym's case* sounds peculiarly harsh; for first the legal estate in the land was given to the queen by a *constructive relation*, and then she was deemed to hold the land discharged of the use, because the king cannot be a trustee. However, it is but justice to mention, that the case being represented to queen Elizabeth, she, much to her honour, granted the land to *cestuique use* by patent. As to the king's holding land discharged of all uses and trusts where the legal estate vests in him, and the sense in which that doctrine is to be understood, see Vin. Abr. *Uses*, C. where most of the authorities on the subject are stated or referred to.—[Hargr. n. 7. 13 a. (68).]

[The king is clearly not subject to a trust in case of an escheat to the crown. But, by

the 39 & 40 Geo. 3. c. 88. s. 12. (amended by stat. 47 Geo. 3. s. 2. c. 24) his majesty is enabled by warrant, under the sign manual, to direct the execution of any trusts, to which lands escheated are liable; and to make any grants of such lands to any trustee or trustees, or otherwise, for the execution of, such trusts.]—[Ed.]

(16) "But if the party appears on an appeal, and the plaintiff counts, and the defendant is convicted by verdict or confession, it is all one." Hal. MSS.—[Hargr. n. 8. 13 a. (69).]

(17) "Nota, if one be attainted by outlawry or confession of a felony, which is precedent to the feoffment of the party attainted, the feoffee may falsify the attainder by traverse to the felony or to the time of the felony. But if he be attainted by verdict, it seems, that he cannot falsify by traverse to the felony; but he may traverse the time of the felony, for that is not material; for if he be guilty on another day, the jury ought to find him guilty." Hal. MSS. which cites 3 Inst. 236.—[Hargr. n. 1. 13 b. (70).]

death of the tenant last seised of the land, without heirs, the right and possession must be presumed to be immediately in the crown, without office, as though the person last seised were the king's immediate tenant; the king's title not appearing by any matter of record, and the possession not having been vacant from the death of the tenant last seised. See *Doe, d. Hayne and Rex v. Redfern*, 12 East, 96. *Infra*, n. (L).—[Ed.]

(x) There is one instance in which lands held in fee-simple are not liable to escheat; for, if lands held of J. S. be given to a dean and chapter, or to a mayor and commonalty, and to their successors; if such corporation be dissolved, the land shall not escheat to the lord, but shall revert to the donor. Ant. 13 b. vol. 1. p. 195.

As the lord's right to an escheat arises solely from the want of a tenant to do the services, it follows, that whenever there is a tenant, the lord cannot claim the lands by escheat. And therefore if the lord enter on the death of the disseisor's alienee without heirs, the

- (196)* *Of the office of escheator.* *(r) Mirror, cap. 1, sect. 5.* *51 H. 3. Statutum de Scac. Britton, fol. 33, 34. Fleta, lib. 1. cap. 36. & lib. 2. cap. 34, 36. Regist. 301. his Oath. 18 E. 1.*
- *Of this word (*eschaeta*), here used by our author, cometh (*r*) *Eschaetor*, an ancient officer, so called because his office is properly to look to escheats, wardships, and other casualties belonging to the crown. In ancient times there were but two escheators in England, the one on this side of Trent, and the other beyond Trent, at which time they had subscheators. But in the reign of Edward the Second, the offices were divided, and several escheators made in every county for life, &c. and so continued until the reign of Edward the Third. And afterwards by the statute of 14 E. 3. it is enacted by authority of parliament, that there should be as *many
- (197)*

disseisee may enter upon the lord; for the disseisee, notwithstanding the disseisin, continues the rightful tenant. Post, 240 a. Gilb. Ten. 25. So if the disseisee dies without heir, and afterwards the lord accepts homage or fealty of the disseisor, he is barred of his writ of escheat, because he has accepted him as his tenant: so if the lord accepts rent from the heir or feoffee of the disseisor, this shall bar him of his escheat; because they are in by title: which is to be understood of a descent or feoffment, after the title of escheat accrued; for, if the disseisor make a feoffment in fee, or die seised, and after the disseisee die without heir, then there is no escheat at all, because the lord has a tenant in by title. Post, 268 a & b. In consequence of this principle, any alienation of the tenant will bar the lord of his escheat: and it has been held, that a feoffment made by an infant in person will have this effect. See Dyer, 10 b. 4 Co. 125 a. *Whittingham's case*, 8 Co. 42 b. So a devise, although it only takes effect at the moment of the testator's death, will prevent an escheat. 1 Rol. Rep. 214. Et vid. ant. 236 a. n. (182.) p. 118. *Secus* as to a void devise. Vaugh. 270.

The lord by escheat is subject to all the incumbrances of the last tenant; as to a grant of a rent, to dower, and curtesy; because they are annexed to the possession of the land, without respect to any privacy. Rol. Rep. 402. 7 Co. 7 b. So, if a copyhold estate escheats to the lord of the manor, he will hold it subject to any lease made by the copyholder with the lord's license; and also to the free bench of the widow. *Turner v. Hodges*, Hut. 102. But the lord by escheat is not subject to any incumbrances annexed to the privacy of the estate, because he comes in, in the *post*; and therefore he was not bound to execute an use, for his title was paramount, namely, by force of the condition in law tacitly annexed to the land, at the time of the creation of the seignory; and the tenancy comes in lieu of the seignory which he had to his own use. And as trusts are now, what uses were before the 27 H. 8., it should seem, that a lord by escheat is not subject to a trust, 1 Stra. 454: 2 Fonbl. Eq. b. 2. c. 7. s. 1. n. (a); however, this point is considered to be doubtful. See 3 Cru. Dig. 497. *Burgess v. Wheate*, 1 Bl. Rep. 178. The lord by escheat may distrain for rent due to the last tenant, for it is incident to the reversion; but he cannot take advantage of a condition of re-entry, because he is not heir to the lessor. Ant. 215 b. p. 85, 86. It should also be observed, that, where there is an outstanding term attendant on the inheritance, the lord by escheat will be entitled to such term. *Thurston v. Attorney-General*, 1 Vern. 340. And he is likewise entitled to all the charters concerning the lands escheated. Bro. Abr. tit. Chart. pl. 59. 3 Cru. Dig. 498, 499.

With respect to what things are subject to escheat: it has been already mentioned, that all lands and tenements held in socage, whether of the king, or of a subject, and all estates by copy of court roll, are liable to escheat. But lands in gavelkind do not escheat for felony, but descend to the heir of the felon: from which Sir William Blackstone concludes, that the tenure of gavelkind is of Saxon, and not of Norman origin. 2 Bl. Com. 252. No species of real property however is subject to escheat, but what lies in tenure; for escheat is a consequence and fruit of tenure. 3 Inst. 21. And therefore a trust estate is not liable to escheat; but where *cestui que trust* dies without heirs, the trustee shall retain the lands for his own benefit. *Burgess v. Wheate*, 1 Bl. Rep. 123. And it seems that an equity of redemption is not liable to escheat, S. C.: nor money directed to be laid out in lands. 3 Cru. Dig. 522.

Where there is an escheat for want of heirs, and the fact is not communicated, it is usual to petition the king, stating that there is such an interest, and praying some reward upon the ground of the discovery, if it can be made out; and the ordinary rule, upon an escheat, is, for the crown to give a lease, as good as it can give, to the person making the discovery. *Per Lord Eldon, C. Moggridge v. Thackwell*, 7 Ves. 71.—[Ed.]

escheators assigned, as when King Edward the Third came to the crown, and that was one in every county, and that no escheator could tarry in his office above a year; and by another statute, to be in office but once in three years (1). The lord treasurer nameth him.

Rot. Parl.
21 E. 1. Rot.
Parl. 1., 22 E.
1. Stat. de Es-
cheatoribus.
14 E. 3. c. 8.
23 E. 1. ca. 18.
F. N. B. 100 c.
Stamf. Prær.
61. 1 H. 8.
c. 8. 3 H. 8.
c. 2. Capita-
la Eschea-
trix in Vet.
Magna Car-
ta, fol. 160,
161, &c.

And hereof also cometh *eschaetria*, which signifieth the escheatorship, or the office of the escheator. But now let us hear what our author will further say unto us.

CHAP. XXXI.*

(198)*

OF TITLE BY PRESCRIPTION.

PRESCRIPTION is a title taking his substance of use and time allowed by the law. *Præscriptio est titulus ex usu et tempore substantiam *capiens ab auctoritate legis* (A). In the common ^{113 a.} Definition of prescription. ^{4 Co. Inst. *113 b.}

(1) The office of escheator is an ancient office, and was formerly of great use to the crown; but, having its chief dependance on the court of wards, which is taken away by act of parliament, it is now in a manner out of date. 4 Inst. 225. Before the statute of Westm. 1. c. 24. escheators, sheriffs, &c. would seise into the king's hands the freehold of the subjects, and thereby disseise them; but by that act it is provided that no seisure shall be made of lands or tenements into the king's hands, before office found. 2 Inst. 206. And the stats. 8 H. 6. c. 16. and 18 H. 6. c. 6. prohibit the granting to farm of lands seised into the king's hands, upon inquest before escheators, until such inquest be returned in the chancery or exchequer, and for a month afterwards (extended to three months, by stat. 1 H. 8. c. 110.) if the king's title in the same be not found of record, unless to the party grieved, who shall have tendered his traverse to such inquest; and avoid all grants made contrary thereto. In *Doe, d. Hayne and Rex v. Redfern*, (cited in n. (1), sup. p. 194, 195.), it was held, that the 8 H. 6. c. 16. and 18 H. 6. c. 6. extended to the case of an escheat upon the death of the tenant last seised, without heirs, where no immediate tenure of the crown was found by the inquest. And that as the crown could not grant to a stranger in such a case, without office, neither could the plaintiff in ejectment recover upon the demise of the crown. And that the 8th sect. of stat. 2 & 3 Edw. 6. c. 8. (which is in general terms and not confined to the particular inquisitions mentioned in other clauses of the acts) extended to avoid any such inquisition of office before escheators, not finding of whom the lands are holden; in the same manner as if the jury had expressly found their ignorance of the tenure. 12 East, 96. See also ant. 77 b. vol. 1. p. 303, 304, 305, and the notes there.—[Ed.]

(A) Every species of prescription, by which property is acquired or lost, is founded on the presumption, that he, who has a quiet and uninterrupted possession for a certain number of years, is supposed to have a just right, without which he could not have been suffered to continue in the enjoyment of it; for a long possession may be considered as a better title than can commonly be produced; it supposes an acquiescence in all other claimants; and that acquiescence also supposes some reason, though perhaps unknown, for which the claim was foreborne. 3 Cru. Dig. 524. 1 Domat. b. 3. t. 7. s. 4. p. 483. 2 Bl. Com. c. 17.

The doctrine of prescription appears to have been very soon established in England; and, from what is said of it by Bracton, seems to have been derived from the Roman law; for Bracton, in the passage cited infra by Lord Coke, lays it down, that a title may be gained both to corporeal and incorporeal hereditaments, by a long and uninterrupted possession. Our modern writers, however, have only allowed a positive prescription to operate in the case of incorporeal hereditaments; such as rights of common, rents, &c. where the person, who claims, can show no other title, than that he and those, under whom he claims, have immemorially used to enjoy them. But there is another kind of prescription adopted by the English law, extending to lands; by which an uninterrupted possession, for a certain

trol's case, 9
Co. 57. 2 Rol.
Abr. 265, 266.
1 Sid. 161.
1 Rol. Abr.
560. 566.
Cro. Cha. 175.)
Prescription
in the person,
and in the
estate.
(4 Co. 36.)
How a pre-
scription dif-
fers from a
custom.
(6 Co. 60 a.
65 b. 66.) 12
F. 4. 1, 2.
Mariz. Br.
Prescr. 100.
6 E. Dyer, 71.
14 E. 3. Bar.
277. 43 E. 3.
32. 7 H. 6. 26.
22 H. 6. 14.
16 E. 2. ult.
Prescript. 53.
45 Ass. 8. 40
Ass. 27. 41.
21 E. 4. 53, 54.
(199)*
(9 Co. 57.)
Circum-
stances re-
quisite to a
good pre-
scription.
Continued
usage.
Bracton, fol.
51, 52.

*114 a:

Bracton, fol.
223 b.

115 a.
Time out of
mind.
Bract. lib. 4.
fol. 30. Fleta,
lib. 4. cap. 24.
(5 Co. 72.
Doct. & Stud.
16 b.)

law a prescription, which is personal, is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath ; or in bodies politic or corporate and their predecessors ; for as a natural body is said to have ancestors, so a body politic or corporate is said to have predecessors (B). And a custom, which is local, is alleged in no person, but laid within some manor or other place. As, taking one example for many, I. S., seised of the manor of D. in fee, *prescribeth thus ; that I. S., his ancestors, and all those whose estate he hath in the said manor, have time out of mind of man had and used to have common of pasture, &c. in such a place, &c. being the land of some other, &c. as pertaining to the said manor. This properly we call a prescription. A custom is in this manner. A copyholder of the manor of D. doth plead, that, within the same manor, there is and hath been such a custom time out of mind of man used, that all the copyholders of the said manor have had and used to have common of pasture, &c. in such a waste of the lord, parcel of the said manor, &c. where the person neither doth or can prescribe, but allegeth the custom within the manor. But both to customs and prescrip-tions, these two things are incidents inseparable, viz. possession or usage, and time. Possession must have three qualities : it must be long, continual, and peaceable ; *longa, continua, et pacifica* : for it is said, *transferuntur dominia, sine titulo, et traditione, per usucapionem, scil. per longam, continuam, et pacificam possessionem*. *Longa, i. e. per spatium temporis per legem definitum*, of which hereafter shall be spoken, *Continuam dico, ita quod non sit legitime interrupta*. **Pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa. Ut si verus dominus, statim cum intrusor vel disseisor ingressus fuerit seisinam, nitatur tales viribus repellere, et expellere, licet id quod inceperit perducere non possit ad effectum, dum tamen cum defecerit, diligens sit ad impetrandum et prosequendum. Longus usus nec per vim, nec clam, nec precario, &c.*

Title of prescription at the common law, is where a custom or usage, or other thing, has been used for time whereof mind of man runneth not to the contrary. *Docere oportet longum tempus, et longum usum illum, viz. qui excedit memoriam hominum ; tale enim tempus sufficit pro jure* (c).

number of years, will give the possessor a good title, by taking away from all other persons the right of entering on the lands, or of bringing any species of action for them. 3 Cru. Dig. 524, 525. The former kind of prescription is the subject of the present chapter ; and the latter will be considered in a subsequent part of this work.—[Ed.]

(b) Prescription to incorporeal hereditaments, by immemorial usage, is of two sorts : either it is a personal right, which has been exercised by a man and his ancestors, or by a body politic and their predecessors, in which case it is called a prescription in the *person* : or else it is a right, attached to the ownership of a particular estate, and only exercisable by those who are seised of that estate ; and in this case is called a prescription in a *que estate*. 3 Cru. Dig. 536.—[Ed.]

(c) Time of memory has been long since ascertained by the law, to commence from the beginning of the reign of Richard I. Ant. 115 a. b. vol. 1. p. 36. n. (s). And where there is any proof of the commencement or origin of a right, since the time of R. I., it cannot be claimed by prescription. See *Pringle v. Child*, 2 Rol. Abr. 269. pl. 17. *Bullen v. Michel*, 4 Dow. 320.—[Ed.]

If a man prescribeth to have a rent, and likewise to take a distress for the same, it cannot be avoided by pleading, that *the rent hath been always paid by coercion, albeit it began by wrong (D). 114 a. Prescription against another prescription, void, 13 E. 4. 6. (200)*

Seeing that prescription maketh a title, it is to be seen; first, to what things a man may make a title by prescription without charter; and secondly, how it may be lost by interruption.

For the first, as to such franchises and liberties as cannot be seised as forfeited, before the cause of forfeiture appear of record, no man can make a title by prescription; because that prescription being but an usage *in pais*, it cannot (*) extend to such things as cannot be seised, nor had without matter of record; as, to the goods and chattels of traitors, felons, felons of themselves, fugitives, of those that be put in exigent, deodands, consuance of pleas, to make a corporation, to have a sanctuary, to make a coroner, *&c., to make conservators of the peace, &c. (1).

What things may be claimed by prescription or not.

*114 b.

(Dr. & Stud. 16. 5 Co. 72.) 21 H. 6. Prescript. 44. 21 E. 4. 6. 1 H. 7. 23. 9 H. 7. 11. 20. 7 H. 6. 45. 6 E. 3. 32. 42. 45 E. 3. 2. 2 E. 4. 26. (9 Co. 59. 2 Rol. Abr. 270.)

Doc. Plac. 103. 2 Rol. Abr. 270. (2) Rol. Abr. 270. 9 Co. 29. Ante, 195 a.) (2) Rol. Abr. 270. 9 Co. 29. Ante, 195 a.)

(a) But to treasure trove, waifs, estrays, wreck of sea, to hold pleas, courts of leets, hundreds, &c., infang thef, outfang thef (E), to have a park, warren, royal fishes, as whales, sturgeons, &c., fairs, markets, frankfoldage, the keeping of a gaol, toll, a corporation by prescription, and the like, a man may make a title by usage and prescription only, without any matter of record. (†) Vide sect. 310, where a man shall make a title to lands by prescription.

(a) 22 E. 3. Coron. 211. 9 H. 7. 11. 20. 18 H. 6. Prescript. 45. 11 H. 4. 10. 21 H. 7. 33. 9 E. 4. 12. 39 E. 3. 35. 46 E. 3. 16. 11 H. 6. 25. F. N. B. 91. 1 H. 7. 24. Stamf. Pl. (†) 8 H. 6. 16.

Cor. 38. 44 E. 3. 4. 22 E. 4. 43, 44. 3 E. 3. Brook Presc. 57.

But it is to be observed, (b) that although a man cannot, as is aforesaid, prescribe in the said franchise to have *bona et catalla proditorum, felonum, &c.*, yet may they and the like be had obliquely, or by a mean, by prescription; for a county palatine may be claimed by prescription, and by reason thereof to have *bona et catalla proditorum, felonum (F), &c.*

(b) 12 E. 4. 16. 32 H. 6. 26. 12 Eliz. Dyer 288, 289. 11 E. 3. tit. Is-sus, 40. (2 Ro. Abr. 271. 3 Inst. 19 Cro. Jam. 155, 156, 454.)

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15 E. 3. tit. Judgment, 133. 14 E. 3. ibid. 155.

(1) See an observation on this doctrine the peace, in 2 Hawk. Pl. C. b. 2. c. 8. s. 10. against prescribing to make conservators of —[Hargr. n. 1. 114 b.]

(c) So if a man prescribes for a way, light, or other easement, another cannot allege a prescription to prevent the enjoyment of it. 2 Mod. 105. Et vid. 9 Co. 57. For other rules touching prescription, see ante, vol. 1. p. 36. 40. —[Ed.]

(E) *Infang thef* and *outfang thef*, are derived from the Saxon *fang*, or *fangen*, i. e. *capere*, and *theof*, *fur*. The former signified a liberty or privilege granted to lords of certain manors, to judge any thief taken *within* their fee. Bract. lib. 3. c. 35. The latter was a privilege, as used in the ancient common law, whereby a lord was enabled to call any man dwelling in his manor, and taken for felony in another place out of his fee, to judgment in his own court. Rastall. Bract. lib. 2. tract. 2. c. 35. stat. 1 & 2 P. & M. c. 15. The franchises of *infang thef* and *outfang thef*, have long since been antiquated and gone. 2 Inst. 31.—[Ed.]

(F) An easement, which is a service or convenience, that one neighbour has of another,

How a title by prescription may be lost. Prescription not destroyed by interruption in the possession only: *secus* as to interruption in the right.

As to the second, by what means a title by prescription, or custom, may be lost by interruption. It is to be known, that the title, being once gained by prescription or custom, cannot be lost by interruption of the possession for ten or twenty years (c), but by interruption in the right; as if a man have had a rent or common by prescription, unity of possession of as high and perdurable estate is an interruption in the right.

(2 Rol. Abr. 71. 72.)
(202)*

In a writ of mesne the plaintiff made his title by prescription, that the defendant and his ancestors had acquitted the plaintiff and his ancestors and the terre-tenant, time out of mind, &c., the defendant took issue, that the defendant and his ancestors had not acquitted the plaintiff and his ancestors and the terre-tenant: and the jury gave a special verdict, that the grandfather of the plaintiff was enfeoffed by one Agnes, and that Agnes and her ancestors were acquitted by the ancestors *of the defendant time out of mind before that time, since which time no acquittal had been; and it was adjudged, and affirmed in a writ of error, that the plaintiff should recover his acquittal, for that there was once a title by prescription vested, which cannot be taken away by a wrongful *cesser* to acquit of late time; and, albeit the verdict had found against the letter of the issue, yet for that the substance of the issue was found, viz. a sufficient title by prescription, it was adjudged both by the court of common-pleas, and in the writ of error by the court of kings bench for the plaintiff; which is worthy of observation. So a *modus decimandi* was alleged (*) by prescription time out of mind for tithes of lambs; and thereupon issue joined; and the jury found, that before twenty years then last past there was such a prescription, and that for these twenty years he had paid tithe lamb *in specie*. And it was objected, 1st. That the issue was found against the plaintiff, for that the prescription was general for all the time of prescription, and twenty years fail thereof. 2. That the party by payment of tithes *in specie* had waived the prescription or custom. But it was adjudged for the plaintiff in the prohibition; for albeit the *modus*

(*) M. 43 & 44 Eliz. in a prohibition between Nowell pl. and Hicks, vicar of Edmonton defendant, in the King's Bench. (2 Co. Blash'p of Winton's case. 6 Co. 60. 3 Co. 9. 2 Rol. Abr. 222.)

without profit, as a way through his land, a sink, or such like, may be claimed by prescription; but a multitude of persons cannot prescribe for an easement, though they may plead a custom. Kitch. Courts, 105 b.

With respect to what things may be claimed by prescription, it may be further observed, that a prescription by immemorial usage can, in general, only be for things which may be created by grant; for the law allows prescription only in supply of the loss of a grant. Ancient grants must often be lost; and it would be hard, that no title could be made to things lying in grant, but by showing the grant. Upon immemorial usage, therefore, the law will presume a grant, and a lawful beginning; and allows such usage for a good title, but still it is only to supply the loss of a grant. And therefore for such things, as can have no lawful beginning, nor be created at this day, by any manner of grant or reservation, or deed, that can be supposed, a prescription is not good. 1 Vent. 387. 3 Cru. Dig. 528. 2 Bl. Com. 265. And there can be no prescription for what the law gives of common right. Thus, the lord of a manor cannot prescribe to have a court baron within his manor, because it is of common right, and incident to a manor; but he may prescribe to enlarge the jurisdiction of his court. *Pill v. Trovers*, Cro. Eliz. 791.—[Ed.]

(c) Formerly a person might have prescribed for a right, though the enjoyment of it was suspended for an indefinite time; but by the statute of limitations, 32 H. 8. c. 2. it is enacted, that no person shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession has been within sixty years next before such prescription made or had. But a prescription in a *que estate* is not within this statute. Brook. Read. 2 Cru. Dig. 540. Post, 115 a.—[Ed.]

decimandi had not been paid by the space of twenty years, yet the prescription being found, the substance of the issue is found for the plaintiff. And if a man hath a common by prescription, and taketh a lease of the land for twenty years, whereby the common is suspended, after the years ended, he may claim the common generally by prescription, for that the suspension was but to the possession, and not to the right; and the inheritance of the common did always remain; and when a prescription or custom doth make a title of inheritance (as Littleton speaketh), the party cannot alter or waive the same *in pais* (2) (H).

*AND here note, that such things which cannot be granted, nor aliened, without deed or fine, a man, which will have such things by prescription, cannot otherwise prescribe, but in him and in his ancestors, whose heir he is, and not by these words, in him and them whose estate he hath; for that he cannot have their estate without deed or other writing, the which ought to be showed to the court, if he will take any advantage of it. And because the grant and alienation of a villain in gross (3) lieth not without deed or other writing, a man cannot prescribe in a villain in gross, without showing forth a writing, but in himself which claims the villain, and in his ancestors whose heir he is. But of such things, which are regardant or appendant to a manor, or to other lands and tenements, a man may prescribe, that he, and they whose estate he hath, who were seised of the manor, or of such lands and tenements, &c. have been seised of those things, as regardant or appendant to the manor, or to such lands and tenements (4) time out of mind of man, &c. (5) (I). And the reason is, for that such manor or lands and (6) tenements may pass by alienation without deed (K). &c.

(203)*
LITTLETON.
[Sect. 183.
120 b.]
How pleaded.
For things
that he is
grant a man
cannot pre-
scribe in a
que estate,
but only in
him and his
ancestors.

Seems as to
things regard-
ant or appen-
dant to a
manor, &c.;

(3) It is observable, that Mr. Serjeant Rolle has incorporated most of the preceding passages relative to prescription into his Abridgement. See Rol. Abr. tit. *Prescription*, and the additional matter in Vin. Abr. same title R—S—T—[Hargr. n. 2. 114 b.]

- (3) *en gros* not in L. and M. nor Roh.
(4) &c. in L. and M. and Roh.
(5) *court* instead of &c. in L. and M. and Roh.
(6) *ou* instead of *et* in L. and M.

(A) A prescription may be lost by the destruction of the thing to which it was annexed; but an alteration in its quality will not destroy the prescription: thus, where a person having two old fulling mills, to which was annexed by prescription a right to a watercourse, pulled them down, and erected two mills to grind corn; it was resolved, that, as the alteration was not of the substance, but only of the quality, or the name of the mill, and that without any prejudice in the watercourse to the owner, the prescription remained. *Luttrell's case*, 4 Co. 86 a.—[Ed.]

(I) If a person prescribes in a *que estate*, (that is, in himself and those whose estate he holds) nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim anything as the consequence, or appendix of an estate, with which the thing claimed has no connexion; but if he prescribes in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross. Therefore a man may prescribe, that he, and those whose estate he has in the manor of Dale, have used to hold the avowson of Dale, as *appendant* to that manor; but if the avowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. 2 Bl. Com. 265, 266. So also a person may prescribe in a *que estate* for a common *appurtenant* to a manor; but if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors. *Mellor v. Spateman*, 1 Saund. 346.—[Ed.]

(K) That is, at common law. See stat. 29 Cha. 2. c. 3.—[Ed.]

121 a.
(c) 22 Ass. 53.
23 Ass. 6.
12 H. 7. 16. 18.
(Doct. Plac.
302, 303, 304.)

(204)*
or as to things
in grant,
where the
que estate is
pleaded in
another;
(d) 39 H. 6. 8.
18 E. 4. 23.
or where the
thing in grant
is but a con-
veyance to
the thing
claimed by
prescription.
(e) 11 H. 4. 89.
19 E. 2. Ac-
tion sur le
case 51. 13
E. 3. Br. 674.
(Cro. Jam.
673. 10 Co.
59 b.)
(f) 9 E. 4.
3 b. 29 Ass.
19. 2 H. 6. 10.
48 E. 3. tit. 33.
3 H. 6. 28.
(Bro. Que Es-
tate 3.)

Of what es-
tate a que
estate may be
pleaded, and
by and in
whom it must be alleged.

(g) 41 Ass. 2. 40 Ass. 28. 2 H. 4. 20. 15 E. 4. 1. 5 H. 7. 39. 18 E. 4. 10. 7 E. 6. tit. Que
Estate, Br. 31. 27 H. 6. 3. 7 El. Dyer 238. (1 Co. 46. 1 Sid. 298. Doc. Plac. 304.)

*121 b.
(A) 22 H. 6.
34. 6 E. 4. 12.
31 H. 8. Que
Estate, Br. 48.

39 H. 6. 14. 9 H. 6. Estop. 25.

(o) 11 H. 4. 81.
27 H. 6. 32.
9 E. 4. 3.

"*Que estate, &c.*" *Quorum statum*, as much as to say whose estate he hath. Here Littleton declareth one excellent rule, (c) that a man cannot prescribe in any thing by a *que estate*, that lieth in grant, and cannot pass without deed or fine; but in him and his ancestors he may, because he comes in by descent without any conveyance. Neither can a man plead a *que estate* in himself, or any thing, that cannot *pass without deed; (d) but in another he may, as, in bar of an avowry, the plaintiff may plead a *que estate* in the seignory in the avowant (L). But Littleton's words are to be observed, (*a man which will have such things by prescription*). Therefore (e) when a thing, that lieth in grant, is but a conveyance to the thing claimed by prescription, there a *que estate* may be alleged of a thing that lieth in grant; as a man may prescribe, that he and his ancestors, and all those whose estate he hath in an hundred, have time out of mind, &c. had a leet, &c. this is good, &c. (M).

(f) Regularly the plaintiff shall not entitle him by a *que estate*, but he must show how he came by it; but, after avowry made, the plaintiff shall plead a *que estate*, because he is now become as a defendant.

(g) A man may plead a *que estate* of a tenancy in tail, or of an estate for life, so as he averreth the life of them; but he cannot plead a *que estate* of a lease for years (7) (N), or at will.

(h) A disseisor, abator, intruder, recoverer, or any other that cometh in the *post*,* shall plead a *que estate*.

(i) A *que estate* must be alleged in the tenant or defendant himself (o), and not in one in the mean conveyance,

(7) But see 1 Lev. 190. and 1 Sid. 298.—[Hargr. n. 6. 121 a.]

(L) As that I. S. whose estate the lord has in the seignory released to him, &c.; for, if he, under whom the lord claims, had no title to the services demanded, the lord can have none, nor shall the plaintiff be bound to show the conveyance to which he is not privy. Hawk. Abr. 179. Bro. Abr. Que Estate, 3.—[Ed.]

(M) For the title to the hundred is not in question, but whether the leet be incident to the hundred. Hawk. Abr. 179.—[Ed.]

(N) A man cannot plead a *que estate* of a term for years in himself; because it cannot be gained by disseisin as a fee may, nor by occupancy, as a freehold might formerly have been gained, but by mesne assignment, or conveyance, which ought to be shown: but one may plead a *que estate* of a lease for years in a stranger, because he is not privy to his title. *Cotes v. Wade*, 1 Lev. 190.—[Ed.]

(o) If the defendant be a pariticular tenant, as tenant for years, the plea must set forth the seisin in fee, the prescription, and the demise from the tenant in fee to the defendant; for a prescription in a *que estate* must always be laid in the person, who is seised of the fee-simple. A tenant for life, for years, or at will, or a copyholder, cannot prescribe in this manner, by reason of the imbecility of their estates; for, as prescription is always beyond time of memory, it would be absurd that those, whose estates commenced within the memory of man, should pretend to prescribe for anything; and therefore a tenant for life must prescribe under cover of the tenant in fee-simple; and a copyholder, under cover of his lord. 4 Co. 31, 32. 2 Bl. Com. 265.—[Ed.]

from whom he claimeth; and yet some books be to the contrary (P). (205)

2 E. 6. tit. Qua
Estate 8. 1 E.

6. Quo Estate, Br. 43. (Cro. Cha. 54. 1 Lev. 130.)

CHAP. XXXII.*

(206)*

OF TITLE BY FORFEITURE.

FORFEITURE. The adjective in Latin is *forisfactus*, the verb is *forisfacere*, and the noun *forisfactura*. They are all derived of *foris*, (that is) *extra*, and *facere*, *quasi diceret, extra legem seu consuetudinem facere*, to do a thing against, or without law or custom; and that legally is called a forfeiture (A). 59 a. Definition of forfeiture.

It is to be observed, that a forfeiture may be made by the alienation of a particular tenant, two manner of ways; either *in pais*, or by matter of record. 251 a. 1. By matter in pais. (1 Rol. Abr. 630.)

In pais, of lands and tenements which lie in livery, where a greater estate passeth by livery than the particular tenant may lawfully make, whereby the reversion or remainder is divested, as in the example that Littleton (416) putteth, when tenant for life alieneth *in fee, which must be understood of a feoffment, fine, or recovery by consent, (B). Alienation by matter in pais for a greater estate than the tenant has, operates as a forfeiture. Vid. sect. 581, 600, 610, 611. *251 b. (1 Rep. 14.)

(P) With respect to the descent of estates gained by prescription, Sir William Blackstone observes, that estates of this kind are not of course descendible to the heirs generally, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo*; and, therefore, if a man prescribes for a right of way, in himself and his ancestors, it will descend only to the blood of that line of ancestors, in whom he so prescribes; the prescription in this case, being, indeed, a species of descent. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate, in which the prescription is laid, and be inheritable in the same manner; whether that were acquired by descent or purchase; for every accessory follows the nature of its principal. 2 Bl. Com. 266.—[Ed.]

(A) Forfeiture is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments: whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, has sustained. Forfeiture by alienation contrary to law, is either alienation *in mortmain* (as to which see ant. 2 b. vol. 1. p. 188.), alienation to an *alien*, (ant. 2 b. vol. 1. p. 91.), or alienation by *particular tenants*, which last kind forms the subject matter of this chapter; in the two former cases the forfeiture arises from the incapacity of the alienee to take, in the latter, from the incapacity of the alienor to grant. 2 Bl. Com. 267, 268.—[Ed.]

(B) Sir William Blackstone mentions two reasons why such alienation by a particular tenant, is a forfeiture of his estate: 1st. because such alienation amounts to a renunciation of the feudal connexion and dependence; it implies a refusal to perform the due renders and services to the lord of the fee, of which fealty is constantly one; and it tends in its consequences to defeat and divest the remainder or reversion expectant: as, therefore, that is put in jeopardy, by such act of the particular tenant, it is but just, that, upon discovery, the particular estate should be forfeited and taken from him, who has shown so manifest an

(307)*
17 El. Dy. 339.
19 El. Dy. 334.

*If tenant for life, and he in the remainder for life, in Littleton's case, had joined in a feoffment in fee, this had been a forfeiture of both their estates, because he in the remainder is *particeps injuriæ*. And so it is, if he in the remainder for life had entered, and disseised tenant for life, and made a feoffment in fee, this had been a forfeiture of the right of his remainder.

Secus as to things in grant, if aliened by deed.
33 E.3. Devise 21. 15 E. 4. 9. Vid. sect. 603, 609, 610. (1 Rol. Abr. 564.)

A particular estate of any thing that lies in grant, cannot be forfeited by any grant in fee by deed. As if tenant for life or years, of an advowson, rent, common, or of a reversion or remainder of land, by deed grant the same in fee, this is no forfeiture of their estates, for that nothing passes thereby, but that which lawfully may pass; and of that opinion is Littleton in our books.

(1 Rep. 76 b.)
26 H. 6. 62.
Tr. 32 El. in Informat. de intrusion vers Robinson pur le Manor de Drayton Bassett, so resolved by the Court of Exchequer.

But, if tenant for life or years of land, the reversion or remainder being in the king, make a feoffment in fee, this is a forfeiture, and yet no reversion or remainder is divested out of the king: and the reason is, in respect of the solemnity of the feoffment by livery, tending to the king's disherison. (1)

2. By matter of record:

By matter of record, and that by three manner of ways. First, by alienation. Secondly, by claiming a greater estate than he ought. Thirdly, by affirming the reversion or remainder to be in a stranger.

as by alienation. (Post, 333 b. 1 Leon 40. 1 Rol. Abr. 565.)

First, by alienation; and that of two sorts, viz. by alienation divesting, or not divesting, the reversion or remainder. Divesting, as by levying of a fine or suffering a common recovery of lands, whereby the reversion or remainder is divested: not divesting, as by levying of a fine in fee, of an advowson, rent, common, or any other thing that lieth in grant: and of this opinion is Littleton in our books (*). And so note two diversities: first, between a grant by fine (which is of record) and a grant by deed *in pais*; and yet in this they both agree, that the reversion or remainder in neither case is divested; secondly, between a matter of record, as a fine, &c. and a deed recorded, as a deed inrolled, for that worketh no forfeiture, because the deed is the original (c).

(*) 15 E. 4. 9.
31 E. 3. Gr. 62.
14 E. 3. 3.
Avo. 117.

(208)*
or by claim.
15 E. 2. Judg.
237. 6 E. 3.
49. 9 E. 3. 4.
18 E. 2. Fines

*Secondly, by claim; and that may be in two sorts, either express or implied. Express, as if tenant for life will in court of record claim fee (d), or if lessee for years be ousted, and he will

inclination to make an ill use of it. The other reason is, because the particular tenant by granting a larger estate than his own, has by his own act determined and put an entire end to his own original interest; and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. 2 Bl. Com. 274, 275.—[Ed.]

(1) See 233 b. note.

(c) And the deed itself, which makes the conveyance, is merely matter *in pais*, though it be afterwards recorded. Hawk. Abr. 339.—[Ed.]

(d) Where a tenant, who holds of any lord, neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord; this disclaimer in any court of record is a forfeiture of the lands to the lord upon reasons evidently feudal. Finch. 270, 271. And so, likewise, if in any court of record the particular tenant does any act which amounts to a virtual disclaimer, as in the instances here put by Lord Coke; such behaviour amounts to a forfeiture of his particular estate.—[Ed.]

bring an assise *ut de libero tenemento*. Implied, as if in a writ of right brought against him, he will take upon him to join the mise upon the mere right, which none but tenant in fee-simple ought to do. So, if lessee for years do lose in a *præcipe*, and will bring a writ of error for error, in process, this is a forfeiture (1) (E).

120. 16 E. 4.
29. 38 H. 6. 29.
2 H. 6. 9. 4 E. 1.
Dy. 9 H. 5. 14.
22 Ass. 31. 13
E. 3. 23. 16
Ass. 16. (Mo.
77. 212. 1 Rep.
16.)

Thirdly, by affirming the reversion or remainder to be in a stranger, and that, either actively or passively. Actively, by five manner of ways. As first, if tenant for life pray in aid of a stranger, whereby he affirms the reversion to be in him. Secondly, if he attorn to the grant of a stranger; and there note also a diversity between an attornment of record to a stranger, and an attornment *in pais*, for an attornment *in pais* worketh no forfeiture. Thirdly, if a stranger bring a writ of entry *in casu proviso*, and suppose the reversion to be in him, if the tenant for life confess the action, this is a forfeiture. Fourthly, if tenant for life, plead covinously, to the disherison of him in the reversion, this is a forfeiture. Fifthly, if a stranger bring an action of waste against lessee for life, and he plead *nul wast fait*, this is a forfeiture; or the like.

252 a.
or by affirm-
ing the rever-
sion to be in
a stranger.
21 E. 3. 14 a.
5 E. 4. 2. 24 H.
8. Forf. Br. 87.
lib. 2. fol. 55.
56. Buckler's
case. 27 E. 3.
77. 17 E. 3. 7
a. 30 E. 3. 16.
29 E. 3. 24. 6
Ass. 5. 5 E. 3.
Entr. Cong.
42. 14 E. 2.
Recett 135. 3
E. 3. 32. 24 E.
3. 68. 1 H. 7.
(1 Rol. Abr.
862. 3 Rep. 4
b. 1 Leon. 254.
2 Rep. 106.)

Passively, as if tenant for life accept a fine of a stranger, *sur conusans de droit come ceo*, &c. for hereby he affirms of record the reversion to be in a stranger (2).

3 Mar. Dy.
143.

*Littleton speaketh of the forfeiture of an estate; and here it is to be known, that the right of a particular estate may be forfeited also, and that he, that hath but a right of a remainder or reversion, shall take benefit of the forfeiture. As if tenant for life be disseised, and he levy a fine to the disseisor, he in the reversion or remainder shall presently enter upon the disseisor, for the forfeiture. And so it is, if the lessee, after the disseisin, had levied the fine to a stranger, though to some respects *partes finis nihil habuerunt*, yet it is a forfeiture of his right.

(209)*
Lib. 2. fol. 55.
Buckler's
case.

Littleton speaketh of an alienation in fee absolutely, but so it is, if the lessee for life make a lease for any other man's life, or a gift in tale. If A. be tenant for life, and make a lease to B. for his life, and B. dieth, and the lessee re-entereth, yet the forfeiture remaineth.

Forfeiture in-
curred by
alienation for
a greater es-
tate than the
tenant has,
though not in
fee; 13 E. 4. 4.

(1) So in the case of a lease for life, the tenant may plead it in bar; but in the case of a lease for years, or an estate of tenant by statute or *elegit*, the defendant shall not plead in bar, as to say, *assisa non*, &c. but justify by force of the lease; and conclude, *assint sans tort*; and if the tenant of the freehold be not named, he shall plead *nul tenant de franc-tenement nosme enle bref*: and in the case of a feoffment with a warranty, he must rely on the warranty. See 228 b. 229 a. [Butler, Note 195.]

(E) For a writ of error to reverse a recovery of a freehold, lies for the tenant of the freehold only (Dyer, 90-5.), and therefore it is a forfeiture for a lessee for years to bring it; so that, where a lessee for years is summoned, and loses by default, he has no remedy; but, if he were summoned and did appear, he might have pleaded in abatement, that no tenant of freehold was named in the writ; if he were not summoned, it seems, that he might have an action grounded on the deceit. 1 Ro. 622. Hawk. Abr. 339, 340.—[Ed.]

(3) But though this acceptance amounts to a forfeiture, it does not divest the estate of him in remainder or reversion. 9 Rep. fol. 106 b. [Butler, Note 196.]

or by alienation on condition, though the tenant enter for a breach: (Ante, 202 b.) 29 Ass. 15. 43 E. 3. Ent. Cong. 30. 2 H. 5. 7. 29 E. 3. 16. 46 E. 3. 26. (Ante, 28 a. 42 a.)

secus as to an alienation to him in remainder.

(210)*
LITTLETON.
[Sect. 415.
251 a.]
3. Who may take advantage of a forfeiture. (1 Rep. 14 a.)

252 a.

(1 Rol. Abr. 620.)

If tenant for life make a lease for life, or a gift in tail, or a feoffment in fee, upon condition, and entereth for the condition broken, yet the forfeiture remaineth (α). Littleton speaketh of an estate for life; so it is if tenant in tail *apres possibilitie*, tenant by the courtesy, tenant in dower, or of him that hath an estate to him and his heirs during the life of I. S., &c. and so of tenant for years, tenant by statute merchant, statute staple, or *elegit*.

Littleton saith, that where the alienation in fee is made to another, which must be intended a stranger, for if it be made to him in reversion or remainder, it amounts to a surrender of his estate, as at large hath been spoken in the Chapter of Tenant for Life (η).

* *IF tenant for life alien in fee, he in the reversion or he in the remainder may enter upon the alienee* (ι).

By Littleton (sect. 416.) it appeareth, that tenant for life in remainder may enter for the forfeiture of the first tenant for life, and that if the tenant for life in remainder make continual claim, and the alienee die seised, then may he in the remainder for life enter; and if he die before he do enter, then he in the remainder in fee shall enter, because he in the remainder in fee could not make any claim (2); and therefore the right of entry, which tenant for life in remainder gained by his claim, shall go to him in the remainder in fee, in respect of the privity of estate: and so it is of him in the reversion in fee in like case, for he is also privy in estate (κ).

(α) So, if tenant for life suffers a recovery, and afterwards reverses it by a writ of error, yet the forfeiture remains. Skin. 74. 4 Com. Dig. 224. Forfeiture. (A 2).—[Ed.]

(η) It may also be observed, that the concurrence of the person who has the immediate estate of inheritance, will prevent a fine from operating as a forfeiture of a life estate. *Bredon's case*, 1 Co. 76. But if a person who has an estate for life, with a remote estate of inheritance after, and subject to intermediate estates of inheritance, levies a fine *sur consuance*, &c. he will forfeit his estate for life. *Pelham's case*, 1 Co. 101. *Garrett v. Bizard*, 1 Rol. Abr. 853. There is a difference, as to this point, between fines and recoveries; for, if tenant for life joins in suffering a recovery with a person who has a remote estate of inheritance, there will not be any forfeiture of the estate for life. *Doe d. Smith v. Clifford*, 1 T. R. 738. 1 Prest. Conv. 202. A fine levied by an equitable tenant for life, does not work a forfeiture. *Ibid.*—[Ed.]

(ι) Entry for a forfeiture ought to be made by him, who is next in reversion, or remainder, after the forfeited estate; whether he has the fee, or only in tail, or for life. 1 Rol. Abr. 857, 858. But, if the next in remainder does not take advantage of the forfeiture, after his estate determined, he in a subsequent remainder may enter. 1 Rol. Abr. 857, 858. Mo. 18. Or if he in remainder for life will not enter, he in the subsequent remainder, or reversion, may enter in his name for the preservation of the inheritance. 1 Rol. 858. So, if he in remainder, or reversion, dies before entry, his issue, or heir, may enter. 1 Rol. Abr. 858. 3 Com. Dig. 228. Forfeiture, (A 6).—[Ed.]

(2) *i. e.* During the life of him in the remainder for life. [Butler.]

(κ) See further as to forfeiture of estates by alienation contrary to law, Ant. Chap. 27. Of Conditions, p. 115; with respect to forfeiture for Crimes, post, b. 3. c. 14; as to Lapse, post, b. 2. c. 55; Simony, ant. vol. 1. p. 420, 421, and the notes there; Waste, post, b. 2. c. 53; Forfeiture of Offices, ant. vol. 1. p. 238—242; and as to forfeiture of Copyhold Estates, see ant. vol. 1. p. 663—665.—[Ed.]

CHAP. XXXIII.*

(211)*

OF TITLE BY ALIENATION.

ALIEN, cometh of the verb *alienare*, *id est*, *alienum facere*, vel '118 b.
ex nostro dominio in alienum transferre, *sive rem aliquam in* Definition of
dominium alterius transferre (A).

(A) In England, prior to the Norman conquest, the power of alienation seems to have been universal; but upon the establishment of the feudal system in this country, all alienation of landed property was prohibited. And during the reign of William the Conqueror, and that of his sons, the prohibition against alienation was strictly enforced. The first step towards a liberty of alienation, was that by which the tenant was permitted to alien with the consent of his lord. This rule was adopted from the maxims which then prevailed on the continent, and gave rise to fines for alienation. But in England the tenant could not dispose of his land, even with the consent of his lord, unless he had also obtained the consent of his next heir; and therefore it was very usual, in ancient feoffments, to express that the alienation was made with the consent of the feoffor's heir, and sometimes for the heir to join in the feoffment. Wright Ten. 167. Glanvil, lib. 7. c. 1. Madox. Form. No. 316. Ant. 94 b. vol. 1. p. 351. The power of alienation was further extended by a law of Henry the First, which allowed a man to dispose of lands which he himself had purchased. Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his assigns by name; but, if his assigns were not specified in the purchase deed, he was not empowered to alien, Glanvil, lib. 7. c. 1; and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir. Mirr. c. 1. s. 3. One method adopted to elude the feudal restraint on alienation, and which very much facilitated its progress, was the practice of sub-infeudation. But by the great charter of Hen. 3. c. 32. no sub-infeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one half or moiety of the land. Dalrym. F. P. c. 3. p. 84. Hitherto the right of alienation was confined to sub-infeudations, conformably to the principles of the feudal law. But by the statute of *Quia emptores*, 18 Edw. 1. reciting, that, through the practice of sub-infeudation, the superior lords had been deprived of their ecclesiastical, wards, and marriages, it was enacted, in favour of the vassals, that they might alienate the whole, or part of their land, as they pleased; and, in favour of the superior lords, that the lands so alienated should be held of them, and not of the alienor. This statute, however, not extending to the king, or his tenants *in capite*, left them as they stood at common law, until the statute *De prerogativa regis*, 17 Edw. 2. c. 6; which is supposed to have indirectly removed the restraint on the king's immediate tenants. But the king's consent being necessary to every alienation of his tenants *in capite*, it became a question, says Sir Martin Wright, whether if such tenant aliened without license, the land so aliened was not forfeited, or whether the king should only seize it by way of distress, until a fine should be paid for the contempt; but this question was settled by the statute 1 Edw. 3. c. 12. which enacted, that in all cases of alienations by tenants *in capite*, the king should not hold the land as forfeited, but should have a reasonable fine in the chancery, to be levied by due process. Wright Ten. 164, 165. It remained much longer a question, whether the king's tenants might have aliened any part of their lands to hold of themselves, as the tenants of common lords might before the statute *Quia emptores*. But such alienations made by tenants who held of Henry the Third, or other kings before him, were at length made good by the stat. 34 Edw. 3. c. 15, saving to the king his prerogative of the time of his grandfather, father, and of his own time. Whatsoever the prerogative was in this particular, which seems extremely doubtful, it is clear that fines for alienation were at this time effectually established; and that they were constantly paid until the stat. 12 Cha. 2. c. 24. which abolished them in all cases of freehold tenure. Idem, 165, 166.

The history of the power of disposing of land by will, will be found in a note to fol. 111 b. post, Chap. 46; and some observations will be offered in the Chapter of Execution (Post, Book III. Chap. 11.) as to involuntary alienation, or the power of charging lands with the debts of the owner.—[Ed.]

(312)*

2 a.

1. Persons capable of purchase.
Natural persons and bodies politic.
Who have ability to grant. Vide Sect. 57.

*Persons capable (B) of purchase are of two sorts, persons natural created of God, as I. S.; I. N. &c. and persons incorporate or politic created by the policy of man (and therefore they are called bodies politic); and those be of two sorts, viz. either sole, or aggregate of many; again, aggregate of many, either of all persons capable, or of one person capable, and the rest incapable or dead in law, as in the Chapter of Discontinuance, Sect. 655, shall he showed. Some men have capacity to purchase, but not ability to hold; some, capacity to purchase, and ability to hold or not to hold, at the election of them or others; some, capacity to take and to hold; some neither capacity to take nor to hold; and some, specially disabled to take some particular thing.

Aliens.
11 Eliz. Dyer,
263. 11 H. 4.
20 & 26. 7 E.
4. 29. (1 Rol.
Abr. 194.)
*2 b.

22 H. 6. 23.
Pl. Com. 483.

(313)*

5 Mar. Br. th.
Denison, 22.

Pasch. 29
Ellis. in Sir
James Croft's

If an alien christian or infidel purchase houses, lands, tenements, or hereditaments, to him *and his heirs, albeit he can have no heirs, yet he is of capacity to take a fee-simple (1) but not to hold (2). For, upon an office found, the king shall have it by his prerogative (3), of whomsoever the land is holden (4). And so it is, if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king (5). If an alien purchase any estate of freehold in houses, lands, tenements, or hereditaments, the king, upon office found, shall have them. If an alien be made a denizen and purchase land, and die without issue, the lord of the fee shall have the escheat, and not the king. But, as to a lease for years, there is a diversity between a lease for years of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for years of lands, meadows, pastures, woods, and the like. *For, if he take a lease for years of lands, meadows, &c., upon office found, the king shall have it (6). But of a house for habitation he may take a lease for years as incident to commerce; for without habitation he cannot merchandise or trade (7). But, if he depart, or relinquish the realm, the king shall have the lease (c). So it is, if he die, possessed thereof, neither his executors or administrators shall have it, but the king (8); for he had it only for habitation as necessary to his trade or traffic, and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for years, albeit it were for his habitation (9): and so it is, if he be an alien enemy. And all this was so resolved by the judges assembled together for

(1) See ante, vol. 1. p. 91. n. (7).

(2) See ante, vol. 1. p. 91. n. (8).

(3) See ante, vol. 1. p. 91. n. (9).

(4) See ante, vol. 1. p. 91. n. (10).

(5) See ante, vol. 1. p. 91. n. (11).

(6) See ante, vol. 1. p. 91. n. (12).

(7) See ante, vol. 1. p. 92. n. (13).

(8) But see ante, vol. 1. p. 92. n. (14).

(9) But see ante, vol. 1. p. 92. n. (15).

(a) The doctrine of alienation may be divided into two heads:—1st. With respect to the persons capable of aliening or purchasing; and, 2dly. As to the several modes of conveyance. With regard to the first point, it is observable, that all persons in possession are *prima facie* capable both of conveying and purchasing, unless the law has laid them under any particular disabilities. 2 Bl. Com. 290. What these incapacities are, will be presently considered. The several modes of conveyance will be explained in a note at the end of this chapter.—[Ed.]

(c) See ant. vol. 1. p. 92. n. (f).—[Ed.]

that purpose in the case of Sir James Croft, Pasch. 29 of the reign of queen Elizabeth.

case 49 Ass.
pl. 2. 49 E. 3.
11. (5 Co. 52
b.)

Also, if a man commit felony, and after purchase lands, and after is attainted, he had capacity to purchase, but not to hold it; for in that case the lord of the fee shall have the escheat (10); and if a man be attainted of felony, yet he hath capacity to purchase to him and to his heirs, albeit he can have no heir, but he cannot hold it; for in that case the king shall have it, by his prerogative, and not the lord of the fee; for a man attainted hath no capacity to purchase (being a man *civiliter mortuus*) but only for the benefit of the king, no more than the alien-née hath.

Persons at-
tainted.

If any sole corporation or aggregate of many, either ecclesiastical or temporal (for the words of the statute be *si quis religiosus vel alius*) purchase lands or tenements in fee, they have capacity to take but not to retain (unless they have a sufficient license in that (11) behalf); for, within the year after the alienation, the next lord of the fee may enter; and, if he do not, then the next immediate lord from time to time to have half a year; and for default of all the mesne lords, then the *king to have the land so aliened for ever, whis is to be understood of such inheritance as may be holden. But of such inheritances as are not holden, as villains, rent-charges, commons, and the like, the king shall have them presently by a favourable interpretation of the statute. An annuity granted to them is not mortmain, because it chargeth the person only.

Corporations
aggregate or
sole. Magna
Charta, cap.
36. 7 E. 1.
stat. 2 de Re-
ligiosis. W. 2.
13 E. 1. cap.
33. 15 R. 2.
cap. 5. 13 H.
6. cap. 10. 39
El. cap. 5. 23
H. 3. Ass. 433.
29 Ass. p. 17.
Brit. fo. 32.
Fleta, lib. 3.
cap. 4 & 5. 19
E. 2. tit. VIII.
34. 29 E. 3.
Ibid. 13. 21 E.
3. 5. 4 H. 6. 9.
19 H. 6. 63.
65. 3 E. 4. 14.
19 E. 3.
Mortm. 8.
34 H. 6. 37.
19 H. 6. 63.
Plowd. 502.
a.) 7 E. 4. 13.
(214)*

I pass over villains or bondmen, who have power to purchase lands, but not to retain them against their lords, because you shall read at large of them in their proper place in the Chapter of Villenage.

Villains.

An infant or *minor* (whom we call any that is under the age of twenty-one years) hath, without consent of any other, capacity to purchase, for it is intended for his benefit; and at his full age he may either agree thereunto, and perfect it, or, without any cause to be alleged, waive or disagree to the purchase; and so may his heirs after him, if he agreed not thereunto after his full age.

Infants.
(Cro. Jam.
320. 1 Ro.
Abr. 731.)

A man of non-sane memory may, without the consent of any other, purchase lands, but he himself (12) cannot waive it; but if he

Persons be-
ing non com-
pos mentis.

(10) Tenant in tail is guilty of murder, and before conviction levies a fine. It was a question, whether the fine should bar the issue for the lord's benefit; and the court inclined to think that it should; but no judgment was given. 1 Wils. 2. Part. 220. (3 Wils. 220. 3d edit.)—[Hargr. n. 10. 2 b. (10).]

(11) As to this, see ant. 98 b. (vol. 1. p. 360.)—[Hargr. n. 11. 2 b.]

(12) Fitzherbert argues strongly, that a

non compos may plead his disability to avoid his own acts as well as an infant. Fitz. Nat. Br. 202. See post, 247 a & b. much curious learning on the subject, and also 2 Blackst. Com. ed. 5. p. 291, where the progress of the opinions on this subject is critically stated.—[Hargr. n. 12. 2 b. (11).]

[In *Stroud v. Marshal*, Cro. Eliz. 398. the opinion of Fitzherbert was denied to be law, and *de non sane memory* held to be a bad plea to an action of debt upon an obligation.

- die in his madness, or after his memory recover, without agreement thereunto, his heir may waive and disagree to the state, without any cause showed; and so of an idiot. But, if the man of non-sane memory recover his memory, and agree unto it, it is unavoidable.

43 Ass. p. 23.

If an abbot purchase lands to him and his successors without the consent of his convent, he himself cannot waive it, but his successor may upon just cause showed; as if a greater rent were reserved thereupon than the value of the land, or the like; but he cannot waive it unless it be upon *just cause: *et sic de similibus, prælatus ecclesiæ suæ conditionem meliorare potest, deteriorare nequit.* And in another place he saith, *Est enim ecclesiæ ejusdem conditionis, quæ fungitur vice minoris.* *But no simile holds in every thing, according to the ancient saying, *Nullum simile quatuor pedibus currit.* (a) An hermaphrodite may purchase according to that sex which prevaileth.

(215)*
Bract. lib. 2.
fol. 12 & 32.

*3 a.
(a) 1 H. 7. 16.
7 H. 4. 17. 13
H. 6. 8. 39 E.
3. 30. 15 E. 4.
fol. 1. b. 27 H.
8. 24.
(Hob. 204. 5
Co. 119. b.

Femes covert.

A feme covert cannot take anything of the gift of her husband (13), but is of capacity to purchase of others without the consent of her husband. And of this opinion was Littleton in our books, and in this book, sect. 677, but her husband may disagree thereunto, and devest the whole estate; but, if he neither agree nor disagree, the purchase is (14) good; but, after his death, albeit her husband agreed thereunto, yet she may, without any cause to be alleged, waive the same, and so may her heirs also, if after the decease of her husband she herself agreed not thereunto.

(b) A name of purchase. 2 H. 4. 26. 1 H. 5. 8. 46 E. 3. 22. 12 Ass. 18. 30 E. 3. 18 F. N. B. 97 a. 1 Ass. 11. 11 H. 4. 32. 9 E. 4. 49. 13 E. 3. Estoppel 231.

(b) A wife (*uxor*) is a good name of purchase, without a christian name; and so it is, if a christian name be added and mistaken, as Em for Emelyn, &c. for *utile per inutile non vitiatur*. But the queen, the consort of the king of England, is an exempt person from the king by the common law, and is of ability and capacity to purchase and grant without the king. Of which see more at large, s. 200.

3 b.
Persons deformed, &c.

Persons deformed having human shape (15), idiots, madmen, lepers, deaf, dumb, and blind, minors, and all other reasonable creatures, have power to purchase and retain lands or tenements (D).

2. Persons capable for some special purpose only.

Some are capable of certain things for some special purpose, but not to use or exercise such things themselves; as the king is capable of an office, not to use but to grant, &c. (16).

However Sir William Blackstone and other writers have considered the opinion of Fitzherbert to be well founded. 2 Bl. Com. 292. 1 Foul. Eq. 48, 49. Et vid. *Yates v. Boen. Stra.* 1104. in which case such plea was allowed to prevail against a bond.

By the 4 Geo. 2. c. 10. idiots, lunatics, and persons *non compos mentis*, or their committees, being trustees or mortgagees, are compellable to convey under the direction of the court of chancery. And all such convey-

ances are declared to be good and valid.]—[*Ed.*]

(13) See ant. vol. 1. p. 132. n. (9).

(14) Acc. post, 356 a. Et vid. ant. vol. 1. p. 133. n. (o).

(15) Who ought to be deemed such, see ant. 7. b. (p. 190.) 29 b. (vol. 1. p. 562, 563.) —[Hargr. n. 2. 3 b.]

(16) See as to this Plowd. 381.—[Hargr. n. 6. 3 b.]

(D) That a bastard, having acquired a name by reputation, may purchase by his reputed name to him and his heirs, see ante, 3 b. vol. 1. p. 148.—[*Ed.*]

A monster born within lawful matrimony, that hath not human shape, cannot purchase, much less retain any thing.

(c) The same law is *de professis et mortuis sæculo* for they are *civiliter mortui* (17); whereof you shall read at large in his proper place, sect. 200.

5. fol. 421. 415. Britt. cap. 22. 39. Fleta, lib. 6. cap. 41. 1 E. 3. 9. 44 E. 3. 4. 3 H. 6. 24. 21 R. 2. Judgment, 263. 7 H. 4. 2. 14 H. 8. 16. Doct. & Stud. 141. Pl. Com. fol. 47. Brit. cap. 33. (Ant. 76 a.)

(d) The parishioners or inhabitants, or *probi homines* of Dale (18), or the churchwardens, are not capable to purchase lands, but goods they are; unless it were in ancient time, when such grants were allowed (19).

(e) An ancient grant by the lord to the commoners in such a waste, that a way leading to their common should not be straitened, was good; but otherwise it is of such a grant at this day. (f) And so in ancient time a grant made to a lord, *et hominibus suis, tam liberis quàm nativis*, or the like, was good: but they are not of capacity to purchase by such a name at this day. But yet at this day, if the king grant to a man to have the goods and chattels *de hominibus suis*, or *de tenentibus suis*, or *de residentibus infra feodum*, &c. it is good; for there they are not named as purchasers or takers, but for another man's benefit, who hath capacity to purchase or take.

(g) But the common law doth disable some men to take any estate in some particular things; as if an office, either of the grant of the king or subject, which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the commonwealth, or the interest, benefit, or safety of the subject, or the like; if these, or any of them, be granted to a man that is unexpert, and hath no skill and science to exercise or execute the same, the grant is merely (20) void, and the party disabled by law, and incapable to take the same, *pro commodo regis et populi*; for only men of skill, knowledge, and ability to exercise the same, are capable of the same, to serve the king and his people. *(h) An infant or minor is not capable of an office of stewardship of the court of a manor, either in possession or reversion (21). (i) No man though never so skilful and expert, is capable of a judicial office in reversion (22), but must expect until it fall in possession (*). And see section 378., where

3. Persons incapable of taking by purchase.

A monster. (Ante, 7 b. 29 b.)

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Persons professed.

(c) Bract. lib.

21 R. 2. Judgment, 263.

33. (Ant. 76 a.)

3 a.

A society not incorporated.

(d) 12 H. 7. 8.

37 H. 6. 30.

10 H. 4. 3 b.

(4 Inst. 237.)

(e) 32 E. 3.

Barre, 261.

(Hob. 38. 6

Co. 59.

(f) 33 E. 3.

Grant 63.

18 E. 3. 60.

12 Ass. 36.

14 H. 6. 12.

34 Ass. p. 11.

40 Ass. p. 21.

3 b.

4. Persons specially disabled to take some particular thing.

(g) 5 E. 4. tit. Office and Officer. Bro.

48. Vinter's case, 5 Mar.

Dy. fol. 160 b. and Scroggs's case.

(Hob. 148.)

(Cro. Jam. 17.)

(217)*

(h) M. 40 & 41 Eliz. in the king's bench, between Scamler and Walters. (Contra March. 43.

S. C. W. Jo. 310. Cro.

Car. 279. 555.)

(i) 11 Co. 2.

(17) But it seems that this doctrine is now become inapplicable; for there is no longer any legal establishment for *professed* persons in England, and our law never took notice of *foreign professions*. See post, 132 b. 2 Rol. Abr. 43. C. Wright's Ten. 28. 1 Salk. 169.—[Hargr. n. 7. 3 b. (17).]

(18) See in Dy. 100. the case of a grant by the crown *probi hominibus de Islington*, rendering a rent.—[Hargr. n. 3. 3 a.]

(19) Acc. as to churchwardens, Finch's

law, 8vo. ed. 178. See Keilw. 32 a. But by 9 Geo. 1. c. 7. they are enabled to purchase a workhouse for the poor; and by custom in some places, as in London, the parson and churchwardens are a corporation to purchase lands. Cro. Jam. 532.—[Hargr. n. 4. 3 a. (13).]

(20) See ant. vol. 1. p. 236. n. (11).

(21) See ant. vol. 1. p. 173. n. (31).

(22) See ant. vol. 1. p. 236. n. (12).

(*) See ant. vol. 1. p. 237. n. (6 1).

in Auditor
Curle's case.
(5 & 6 E. 6.
c. 15. and ant.
234 a.) Vid.
sect. 378. 1 H.
7. 31.

bargaining or giving of money, or any manner of reward, &c. for offices there mentioned, shall make such a purchaser incapable thereof: which is worthy to be known; but more worthy to be put in due execution.

3 a.

5. By what
names per-
sons may
purchase.
Purchaser
must be

(k) And regularly it is requisite, that the purchaser be named by the name of baptism and his surname, and that special heed be taken to the name of baptism; for that a man cannot have two names of baptism as he may have divers surnames (23).

named by his proper name of baptism and surname.
(k) Bract. lib. 4. tract. 1. cap. 20. Brit. fol. 121, 122. 3 E. 3. 78. 26 E. 3. 43. 26 Ass. 61.
30 Ass. 16. 46 E. 3. 22. 39 E. 3. 17. 3 H. 6. 25. 19 H. 6. 2. 30 H. 6. 1. 34 H. 6. 19.
11 H. 4. 27. 9 E. 4. 29. 5 E. 4. 46. 65. 14 H. 7. 11. 20 Eliz. Dyer. 259. 8 E. 3. 436.
20 E. 3. 25. 1 H. 4. 5. 3 H. 6. 26. 19 H. 6. 2. 34 H. 6. 19. 5 E. 4. 55. 27 H. 8. 11.
1 H. 5. 5. 18 E. 3. 32. 27 E. 3. 86. 8 E. 3. 427. 7 H. 6. 29. 9 H. 5. 9.

(l) 40 E. 3. 22.

Fitzwilliam.

24 E. 3. 64.

Fitzjohn.

39 E. 3. 24.

Fitzrobert.

27 E. 3. 85.

tit. Grant, 67.

18 E. 3. 23, 24.

18 E. 4. 8b.

14 H. 7. 31, 32.

13 E. 4. 8.

5 E. 3. Vouch.

179. 37 E. 3.

85. where the

proper name

is mistaken.

(6 Co. 65. 10 Co. 132 b. Hob. 32. 2 Rol. Abr. 44. Mo. 232.)

Secus where there can be no uncertainty as to the person:

(l) And it is not safe in writs, pleadings, grants, &c. to translate surnames into Latin. As if the surname of one be Fitzwilliam, or Williamson, if he translate him *Filius Willi.* if in truth his father had any other christian name than William, the writ, &c. shall abate; for Fitzwilliam or Williamson is his surname, whatsoever christian name his father had, therefore the lawyer never translates surnames. And yet in some cases, though the name of baptism be mistaken (as in the case before put to the wife) the grant is good.

but in plead-
ing the pro-
per name
must be
shown.*

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Name of bap-
tism being
changed at
confirmation,
a purchase
by the name
of confirma-
tion is good.

So it is, if lands be given to Robert earl of Pembroke, where his name is Henry, to George bishop of Norwich, where his name is John, and so of an abbot, &c.; for in these and the like cases there can be but one of that dignity or name. And therefore such a grant is good, albeit the name of baptism be mistaken. If by license lands be given to the dean and chapter of the holy and undivided Trinity of Norwich, this is good, although the dean be not named by his proper name, if there were a dean at the time of the grant; but in pleading he must show his proper name. And so, on the other side, if the dean and chapter make a lease without naming the dean by his proper name, the lease is good, if* there were a dean at the time of the (24) lease; but in pleading, the proper name of the dean must be showed; and so is the book of 18 E. 4. to be intended; for the same judges in 13 E. 4. held the grant good to a mayor, aldermen, and commonalty, albeit the mayor was not named by his proper name; but in pleading it must be showed, as is there also holden (25). If a man be baptized by the name of Thomas, and after at his confirmation by the bishop he is named John, he may purchase by the name of his confirmation. And this was the case of Sir Francis Gawdie, late chief justice of the court of common pleas, whose name of baptism was Thomas, and his name of confirmation Francis, and that name of Francis, by the advice of all the judges, in *anno* 36 H.

(23) See Cro. Eliz. 27. 222. 328. Cro. 1. p. 193.) See 21 E. 4. 15, 16.—[Hargr. Jam. 558.—[Hargr. n. 5. 3 a.] n. 6. 3 a.]

(24) But not otherwise, ante, 264 a. (vol.

(25) See 1 Leon. 307. Dy. 86.—[Hargr. n. 7. 3 a.]

8. he did bear, and after used in all his purchases and grants (26). (m) And this doth agree with our ancient books, where it is holden, that a man may have divers names at divers times, but not divers christian names (e). And the court said, that it may be that a woman was baptized by the name of Anable, and forty years after she was confirmed by the name of Douce, and then her name was changed, and after she was to be named Douce, and that all purchases, &c. made by her name of baptism before her confirmation remain good; a matter not much in use, nor requisite to be put in use, but necessary to be known. (n) But purchases are good in many cases by a known name, or by a certain description of the person, without either surname, or name of baptism, as *uxori* I. S., as hath been said, or *primo genito filio*, or *secundo genito filio*, &c. or *filio natu minimo* I. S., or *seniori puero*, or *omnibus filiis*, or *filiabus* I. S. or *omnibus liberis seu exitibus* of I. S., or to the right heirs of I. S.

(o) But if a man do infranchise a villain *cum totâ sequellâ suâ*, that is not sufficient to infranchise his children born before, for the uncertainty of the word *sequellâ*. (p) But regularly in writs, the demandant or tenant is to be named by his christian name and surname, unless it be in cases of some corporations or bodies politic (27).

*Now somewhat is to be said, who have ability to infeoff, &c. and may be a feoffor, donor, lessor, &c. Whosoever is disabled by the common law to take, is disabled to infeoff, &c. But many that have capacity to take, have no ability to infeoff, &c. as men attainted of treason, felony, or of a *præmunire*, aliens born, the king's villains, traitors, felons, &c. he that hath offended against the statutes of *præmunire* after the offences committed (28), if attainders ensue, idiots, madmen, a man deaf, dumb and blind from his nativity, a feme covert (r), an infant (29), a man by duress; for the feoffments, &c. of these may be avoided. But a heretic, though he be convicted of heresy, a leper removed by the king's writ from the society of men, bastards, a man deaf, dumb, or blind, so that he hath understanding and sound memory, albeit he express his intention by signs, villain of a common *person before entry, or the like, may infeoff, &c.

(26) Acc. 2 Rol. Abr. 135. A.—[Hargr. n. 8. 3 a.]

(27) As to naming of persons in writs and pleadings, see Theol. Dig. Br. Orig. lib. 3. and 6. and the title *Abatement* in Com. Dig. —[Hargr. n. 9. 3 a.]

(28) As to conveyances made by felons or by offenders against the statutes of *præmunire* between indictment and attainder, see W. Jo. 217. Cro. Cha. 172. and Wils. vol. 1. part 2. p. 219.—[Hargr. n. 3. 42 b.]

(29) There is an important difference be-

(e) Acc. 1 Com. Dig. 19, 20. Abatement (E. 18. 19.). Bac. Abr. Misnomer, B. *Rez v. Billinghurst*, 3 Maul. & S. 254.—[Ed.]

(r) In general the conveyance or other contract of a feme covert (except by some matter of record) is void, and not merely voidable; but it has been held, that re-delivery by a woman, after the death of her husband, of a deed delivered by her whilst covert, was a sufficient confirmation of such deed, so as to bind her, without its being re-executed or re-

(m) 22 R. 2. Briefe, 936.
12 R. 2. Feoffments, 58.
2 E. 2. 14.
2 E. 3. 21.
3 H. 6. 26.
34 H. 6. 19.
1 H. 7. 29.
5 E. 2. Briefe, 741. 14 H. 7. 11.
So if made by the name of baptism before the change.
(n) 17 E. 3. 29.
16 E. 3. 59.
30 E. 3. 18.
11 H. 4. 84.
Pl. Com. 526.
21 R. 2. De vise. 41 E. 3. 19. 15 E. 3. Counter plea de Vouch. 43.
35 Ass. 13.
37 H. 6. 30.
11 E. 4. 2.
7 H. 6. 5. 40
E. 3. 2. 37 H.
8. Bro.
Nomme, 40.
(o) 15 H. 7. 14.
(p) 8 E. 3. 437.
29 E. 2. 44.
19 E. 4. 11.
21 E. 4. 19.
7 H. 6. 29.

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42 b.

6. Persons disabled to alien.
Men attainted.
Bract. lib. 5. fol. 415. Brit. fol. 58. Fleta, lib. 3. cap. 3. & lib. 5. ca. 39, 40.
Aliens.
The king's villains.
Persons being non compos mentis.
Femes covert.
Infants.
Persons under duress.

*43 a.

2 H. 5. cap. 7
which is repealed. Doct. & Stud. lib. 2. cap. 29.

Bishops and others having ecclesiastical livings.

(q) 32 H. 8. cap. 28. 1 El. not printed.
18 El. ca. 10.
14 El. ca. 11.
18 El. ca. 20.
1 J. a. cap. 3.
(r) 4 Co. 76.
120. 5 Co. 6.
14. 6 Co. 37.
11 Co. 67.
Magdalen College case.
Vide L'est. de W. 2. ca. 41.

7. Fines for alienation. Origin of fines for alienation.

(c) Magna Charta, cap. 32.

Mirr. cap. 5. sect. 2. Glanv. lib. 7.

cap. 1. Bract. lib. 1. Britt.

88. Acc. Flea. lib. 3. c. 3.

(s) Vide an excellent declaration hereof inter adjudicat' coram Rege, Tr.

E. 1. fol. 2. in Thesaur.

Nou. and Derb.

(w) Bract. l. 1. 10 H. 6. fol.

10b. 33 E. 3. Avowry, 265.

Stamf. Prer. fol. 29. 8 E. 4. 12.

(q) All feoffments, gifts, grants, and leases by bishops, albeit they be confirmed by the dean and chapter, by any of the colleges or halls in either of the universities, or elsewhere, deans and chapters, master or guardian of any hospital, parson, vicar, or any other having spiritual or ecclesiastical living, are also to be avoided; (r) and all the said bodies politic or corporate, are by the statutes of the realm disabled to make any conveyances to the king, or to any other, as it hath been adjudged: which statutes have been made since Littleton wrote (30).

It is provided (s) by the statute of *Magna Charta, quod nullus, liber homo det de cætero amplius alicui de terrâ suâ, quàm ut de residuo terræ suæ posset sufficient' fieri domino feodi servitium ei debitum quod pertinet ad feodum illud*. Upon which act I have heard great question (t) made, whether the feoffments made against that statute were voidable or no; and some have said that the statute intended not to avoid the feoffment, but implicitly to direct the tenure, viz. that the tenant should not infeoff another of parcel to hold of the chief lord (that is, of the next lord) but to hold of himself, and then the lord may distrain in every part for his whole service without any prejudice unto him. But this opinion is against (u) the authority of our books and against the said statute of *Magna Charta*. For first it is agreed in 10 H. 7. that as well before the statute as after, a tenant which held two acres might have aliened one of the acres to hold of him, and notwithstanding the lord might have distrained in which of the acres he would for his whole services: and reason teacheth that before that statute a tenant could not have aliened parcel to hold of the chief lord; for the seignory of the lord was entire, for the which the lord might distrain in the whole or in any part, and which the tenant by his own act cannot divide to the prejudice of the lord to bar him to distrain in any part, for his services, as he should do; if he should infeoff another of parcel to hold of the chief lord. But the tenant might have made a feoffment of the whole to hold of the chief lord, for there no prejudice ensued

between the deeds of femes covert and infants. Those of the former are always void; but those of the latter are sometimes void, and sometimes only voidable. As to the distinction between *void* and *voidable* in the case of deeds by infants, see a case in Burr. 4. part 3. fol. 1794, in which the court held a conveyance by lease and release by an infant to be voidable only. See further, sect. 259. ante.—[Hargr. n. 4. 42 b. (249).]

[See ant. vol. 1. p. 177. n. (41). By the 53 Geo. 3. c. 141. it is enacted, that all contracts for the purchase of any annuity with an infant shall be utterly void; any attempt to confirm the same after such person shall have attained the age of twenty-one years notwithstanding; and by the same statute,

the endeavouring to induce infants to grant annuities is punishable as a misdemeanor.] —[Ed.]

(30) "And in case of corporation aggregate, as dean and chapter, the lease is void against the dean who makes the lease. M. 13 Car. B. R. *Lloyd and Gregory*. But it is otherwise in the case of a sole corporation, for there it is void only against the successor. M. 44 Eliz. C. B. *Saunders's case*." Hal. MSS.—See the observation on the case of *Lloyd and Gregory*, post, 45 a. As to conveyances by corporations before the restraining statutes, see post, 44 a. and ant. 103 a. (vol. 1. p. 371, 372).—[Hargr. n. 1. 43 a. (250)].

attested; and that circumstances alone might be equivalent to such re-delivery; though the deed were a joint-deed by the husband and wife, affecting the wife's land, and no fine levied. *Goodright d. Carter v. Straphan*, 1 Cowp. 201.—[Ed.]

to the lord (31). Others have said, and they *said truly, that the intention of the statute was, that the tenant could not alien parcel (which might turn to the prejudice of the lord) without his assent, and this appeareth clearly by the Mirror. And by this statute the king took benefit to have a fine for his license, before which statute no fine for alienation was due to the king. For it is (*w*) adjudged that for an alienation in the time of Henry the Second, no fine was due; and it appeareth in our books, that if an alienation had been made before 20 H. 3., no fine was due to the king for alienation (32). Now it is to be observed, that oftentimes for the better understanding of our books, the advised reader must take light from history and chronicles, especially for distinction of times. And therefore Matthew Paris (who in his Chronicle reciteth *Magna Charta*) (33) testifieth that king Henry the Third by evil counsel (and especially, as the truth was, of Hubert de Burgo, then chief justice) sought to avoid the Great Charter first granted by his father king John, and afterwards granted and confirmed by himself *in the 9th of Henry the Third, for that as he the said king John did grant it by duress, and that he himself was within age when he granted and confirmed it. But forasmuch as afterwards the said king Henry the Third, in the twentieth year of his reign, at what time he was

Mirr. cap. 5. sect. 2. Flia, lib. 3. c. 3. (w) 26 Ass. p. 37. 20 Ass. p. 17. 30 E. 3. Avowry, 126. 31 E. 3. c. 15. Vide Stamf. 29. 30. Mat. Paris. Walsingham 37. 38.

Vide 5 H. 3. Mordance. 68. Magna Charta there vouched, which was the charta of king John, for it was cited before 9 H. 3.

(232)*

(31) This assertion has been controverted, as repugnant to the feudal notions of alienation, and inconsistent with any reasonable construction of the statute *quia emptores terrarum*. Wright's Ten. 155. Dalrymple, Hist. Feud. Prop. 80. and Sulliv. Lect. 418. In fact the history of our law with respect to the powers of alienation before the statute of *quia emptores terrarum* is very much involved in obscurity. See Bract. lib. 2. cap. 19. where the author inquires, *si ille cui datum est, rem datam ulterius dare posset*. See also Bract. lib. 2. cap. 5. and Staundf. Prærog. cap. 7.—[Hargr. n. 2. 43 a. (251).]

(32) *Nota, for seizure of serjeanties aliened without license, it seems that it was the ancient law. Vid. Roger Hoveden, 783. It was one of the articles *inter capitula coronæ R. 1. de serjantiis alienatis*, and so it still continues. Claus. 7 Johann. m. 11. precept to seize *serjantias theinagia et dengagia tent. de honore Lancaster alienat. post. primam coronation*. H. 2. Vid. T. 7 E. 1. *coram rege Gilbertus de Clare comes Gloucester* impeached for alienation made to his father. Vid. 24 E. 3. 71. special custom to alienate without license. Videtur per Rot. Parl. 29 E. 3. n. 18. *quoad* other tenures than serjeanties the prerogative began in the time of Edward the First. Nota, it seems, that the statute of *quia emptores* takes away licenses and pardons of alienations in case of tenure of a subject. Yet see 14 H. 4. 4. *recordare longum* for custom of the honour of Gloucester, and Rot. Parl. 38 H. 6. n. 29. *pro ducatu Cornubie ubi* such a custom Rot. Parl. 8 E. 2. m. 7. *in sedula pendente dorso*. 'Accord

est et assensu per archiepses evesques abbes priores countes et barons et autres du realme in parlement le roy summons a Westminster octab. Hill. 8 E. 2. que eux desormes nul fine demandront ne prendront des frankhomes, pur entrer terres et tenements que sont de leur fee, issint totes voyes que per tiel feoffments ils ne soient pas eloignes de leur services ne leur services dedit.' Hal. MSS. From Lord Hale's observing, that the crown's right of seizure for alienation of serjeanties without license *still continues*, it seems, that his note on the subject was written before the 12 Cha. 2. c. 24, which converts tenures by knight-service into socage, and takes away fines of alienation. See post, 43 b. n. 2.—[Hargr. n. 3. 43 a. (252).]

(33) Nota pro carta de libertatibus.—Carta regis Johann. proclamata 19. Junii 17 Johann. apud Runimede, Pat. 17 Johann. m. 33. dorso. Carta de libertatibus sub. H. 3. magna scilicet de libertatibus, et minor sive de foresta, proclamantur 8 Maii 9 H. 3, prima pars claus. 9 H. 3. m. 14, dorso interrupt. et cancell. Matth. Paris sub anno 1227. p. 336, but afterwards confirmed by H. 3. 'Rex confirmat omnes libertates, &c. contentas in cartis quas fecimus cum minoris ætatis essemus tam in magna carta quam in carta de foresta.' Cart. 21 H. 3. n. 4, confirmatur per stat. Marlbr. cap. 5, et tunc primum devenit statutum, viz. 52 H. 3.' Hal. MSS.—See a most accurate history of the *magna charta* of king John and that of Hen. 3, in the introductory discourse to Mr. Justice Blackstone's valuable edition of the charters.—[Hargr. n. 4. 43 a. (253).]

*43 b.

20 Ass. pl. 17
by Skipwith.

nine and twenty years old, did grant and confirm the said Great Charter : for that cause, to put out all scruples, is the twentieth year of Henry the Third named, albeit in law the king's charter granted in the ninth year of Henry the Third was of force and validity, notwithstanding his non age, for that in judgment of law the king, as king, cannot be said to be a minor ; *for when the royal body politic of the king doth meet with the natural capacity in one person, the whole body shall have the quality of the royal politic, which is the greater and more worthy, and wherein is no minority (34). For, *omne majus trahit ad se quod est minus*. And it is to be observed, that no record can be found, that either a license of alienation was sued, or pardon for alienation was obtained for an alienation without license at any time before the twentieth year of Henry the Third, and it is holden in the twentieth of Edward the Third, that a license for alienation grew by this statute.

Britt. fol. 28.
63. 186, 187.
245, 247.
Prer. Regia.
ca. 7. Fleta.
lib. 6. cap. 29.
acc. 20 E. 3.
Ass. 122. 29
Ass. pl. 19.
14 E. 3. Quare
Imp. 45. 14 H.
4. 2. 3. 9 E. 3.
fol. 28. 1 E. 3.
cap. 12. 34 E.
3. cap. 15. 2
Co. 81, 82,
in Seignor
Cromwell's
case.
Fines for
allination,
when taken
away.
(223)*
Regist. Int.
les breves de
onerand' pro
rata portione.

10 a.
8. The differ-
ent modes of
alienation.

Now, in the case of a common person, it was the common opinion, that if the tenant had aliened any parcel contrary to the said act, that he himself was bound by his own act, but that his heir might have avoided it ; and in the king's case many held the same opinion. For Britton saith, *Ne counts, ne barons, ne chivaler, ne serjeants, que teignent en chiefe de nous ne purr' my dismember nous fees sauns licence: que nous ne puissent per droit engettre les purchasors, &c.* And herewith agreeth Fleta, and our books. But now, by the statute 1 E. 3. cap. 12. and 34 E. 3. cap. 15., although the king's tenant in chief or by grand serjeanty do alien all or any part without license, yet is there not any forfeiture of the same, but a reasonable fine therefore to be paid. And note, it appeareth by the preamble in 1 E. 3. that complaint was made that land holden of the king *in capite*, being aliened without license, was seized as forfeited. And in the case of a common person, the statute of 18 E. 1. *De quia emptores terrarum* hath made it clear, for this hath, in effect, as to the common persons, taken away the said statute of *Magna Charta*, cap. 32. for thereby it is provided, *Quodd liceat unicuique libero homini terras suas seu tenementa, sua, seu partem inde ad voluntatem suam vendere, ita quodd feoffatus teneat, &c. de capitali domino*. And herein are divers notable points to be observed. First, that this word *liceat* proveth that the tenant could not, or at least ways was in danger to alien parcel of his tenancy, &c. upon the said act of *Magna Charta*. Secondly, that upon the feoffment of the whole, the tenant shall hold of the chief lord. Thirdly, that the tenant might infeoff one of part to hold *pro particula* of the chief lord. But this act (the king being not named) doth not take away the king's fine due to him by the statute of *Magna Charta* (35).

(34) See ant. vol. 1. p. 75. n. (18).

(35) Fines for alienation are taken away as well from the king as from all others by the 12 Cha. 2. chap. 24. But the statute saves fines for alienation due by the customs of particular manors, other than fines for

alienation of lands holden of the king *in capite*.—See further on the subject of alienation, 2 Inst. 65. 501. Vin. Abr. tit. *Alienation*. Sulliv. Lect. p. 159, and 418, and the book cited in fol. 43 a. n. 2. (Supra, n. (31).—[Hargr. n. 2. 43 b. (254).]

Out of that which hath been said, it is to be observed, that a man may purchase lands to him and his heirs by ten manner of conveyances, (for I speak not here of estoppels.) First, by feoffment. Secondly, by grant (of which two our author in sect. 1. speaketh.) Thirdly, by fine, which is a feoffment of record. Fourthly, by common recovery, which is a common conveyance, and is in nature of a feoffment of record. Fifthly, by exchange, which is in nature of a grant. Sixthly, by release to a particular tenant. Seventhly, by confirmation to a particular tenant, both which are in nature of grants. Eighthly, by grant of a reversion or remainder with attornment of the particular tenant, of all which our author speaketh hereafter. Ninthly, by bargain and sale by deed indented and inrolled, ordained by statute since Littleton wrote. Tenthly, by devise by custom of some particular place, as he sheweth hereafter, and, since he wrote, by will in writing, generally, by authority of parliament (e).

27 H. 8. cap.
16. 22 H. 8.
cap. 2. 34 H.
8. cap. 5.

CHAP. XXXIV.*

(224)*

OF ALIENATION BY DEED.

FACTUM, *Anglice*, a deed, (1) signifieth, in the common law, an instrument consisting of three things, viz. writing, sealing, and delivery, comprehending a bargain or contract between party and party, man or woman. It is called of the civilians *litterarum obligatio* (A).

171 b.
Definition of
a deed.
Brit. fol. 65,
66, & 101.
Fleta, lib. 3.
cap. 14.
(Park. sect.
135.)

(e) With respect to the different modes of alienation, or rather the legal evidences of the transfer of real property, they are called the common assurances of the realm, whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed. And these common assurances are divided by Sir William Blackstone into four kinds, 1st. Deeds or matters *in pais*, which are assurances transacted between two or more private persons *in pais*, in the country, that is (according to the old common law) upon the very spot to be transferred. 2d. Matters of record, or assurances transacted only in the king's public courts of record. 3d. Assurances deriving their effect from special custom, obtaining in some particular places, and relating only to some particular species of property. 4th. A devise contained in a person's last will and testament, which takes no effect till after his death. 2 Bl. Com. 294.—[Ed.]

(1) In the cases of *Wells v. Gough*, and of *Oxenham v. Horsfall*, in B. K. Mich. T. 37 G. 3. the court is said to have holden a sealed award by an arbitrator to be a deed within the stamp duties, though it was contended, that to be a deed, there should be a contract and delivery, as well as sealing; and that otherwise all wills, and all warrants of magistrates, would become liable to the deed-stamp-duties; but *quære*, as to the grounds of the decision; and note, that I have seen a subsequent opinion of Mr. Sergeant Hill, concerning an award made by commissioners of an Inclosure Act, not quite accord with the cases in B. R. I have thus referred to. [Butler.]

(A) It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called a deed, in Latin *factum*, because it is the most solemn and authentic act that a man can perform, in the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed. Plowd. 434. 2 Bl. Com. 295.

35 b.

1. The different kinds of deeds.

(a) Brit. fol. 101. Bract. lib. 2. fol. 33. Fleta, lib. 3. cap. 14. (2 Inst. 673.) *36 a.

(225)*

Of deeds, some be indented, and some be deeds poll. Of indented, some be bipartite, some tripartite, some quadripartite, &c. whereof more shall be said in the Chapter of Conditions. Also of deeds, some be inrolled, and some (a) be not inrolled. If it be inrolled according to the statute of 27 H. 8. cap. 10. it must be inrolled in parchment for the strength and continuance thereof, and not in paper, and so was it resolved in parliament *by the judges in anno 23 Eliz. Now for the rest of the parts of a deed, you shall read thereof *plentifully in our books, and in my Reports; which by this short instruction you shall easily understand (1).

Of deeds some concern the realty, as a deed of feoffment; some the personalty, as a deed of gift of goods, obligations, bills, &c. And some mixt, whereof more shall be said in the Chapter of Releases.

(b) Bract. lib. 2. fol. 33 b. Fleta, lib. 3. cap. 14.

Of deeds, and their distinctions, you shall read excellent matter in antiquity. (b) *Cartarum, alia regia, alia privatarum, et regiarum, alia privata, alia communis, et alia universitatis. Privatarum, alia de puro feoffamento et simplici, alia de feoffamento conditionali sive conventionali, alia de recognitione pura, vel conditionali, alia de quiete clamantia, alia de confirmatione, &c. Verba intentioni, non è contra, debent inservire.*

(c) Fleta, lib. 3. ca. 22. Bract. lib. 2. fol. 34.

(d) Bract. lib. 2. fol. 94, 95.

(e) Idem. lib. 2. fol. 18.

Carta non est (c) nisi vestimentum donationis. Carta non est nisi vestimentum orationis. Nemo tenetur armare adversarium suum contra se. Scriptum est instrumentum ad instruendum quod mens vult. Carta est legatus mentis. (d) Benigne sunt faciendæ interpretationes cartarum propter simplicitatem laicorum, ut res magis valeat quàm pereat. Nihil tam (e) conveniens est naturali æquitati, quàm voluntatem domini volentis rem suam in alium transferre ratam habere.

(f) Pl. Com. in Throgmorton's case, f. 161 b.

(f) *Re, verbis, scripto, consensu, traditione, Junctura vestes sumere pacta solent.*

(1) See further as to deeds, Perk. c. 2. c. 4. Vin. Abr. tit. *Deeds*, and also tit. *Faits*. post, 6 a. and n. 5. there Sheph. Touchst. Com. Dig. *Fait*.—[Hargr. n. 1. 36 a.]

It is probable that every alienation was very soon accompanied with some written evidence, though in the time of the Saxons a legal transfer might be made of lands by certain ceremonies, without any charter or writing. Mad. Form. Pref. Deeds or charters were notwithstanding in use at this time: these were generally called *gewrite* or writings; and the particular deed by which a free estate might be conveyed was called *landboc, libellus, de terra*, a donation or grant of land, and the land thus granted was called *bockland*. Idem. 283. Upon the introduction of the Norman customs, the solemn and public delivery of the possession, in imitation of the feudal investiture, became essentially necessary to the transfer of land, and was alone sufficient for that purpose. But, as written charters constituted a much better species of evidence of the agreement of the parties, a charter or deed, in imitation of the *Breve Testatum* of the feudal law, was usually prepared and executed; and was delivered to the purchaser at the same time with the land. The increase of commerce and wealth having introduced a greater degree of refinement in manners, agreements and conveyances became more complex, which produced an universal practice of reducing them into writing. But still lands might have been transferred by a verbal contract only, provided it was attended with a solemn and public delivery of the possession, until the latter end of the reign of Cha. 2. 4 Cru. Dig. 10, 11.—[Ed.]

Verba cartarum fortius accipiuntur contra proferentem. Gerere dictum generaliter est intelligendum. Verba debent intelligi secundum subjectam materiam. Carta de non ente non valet.

"Deeds indented." Those are called by several names, as *scriptum indentatum, carta indentata, scriptura indentata, indentura, literæ indentatæ*. An indenture is a writing *containing a conveyance, bargain, contract, covenants, or agreements between two or more, and is indented in the top or side answerable to another that likewise comprehendeth the self-same matter, and is called an indenture, for that it is so indented, and is called in Greek *συγκυρρον*. 229 a.
Deeds indented and deeds poll distinguished.
Vid. sect. 217.
(226)*
(Ante, 143 b.)

If a deed beginneth, *hæc indentura, &c.* and in troth the parchment or paper is not indented, this is no indenture, because words cannot make it indented. But if the deed be actually indented, and there be no words of indenture in the deed, yet it is an indenture in law; for it may be an indenture without words, but not by words without indenting. Lib. 5. fol. 20.
Sille's case.
(2 Rol. Abr.
22. 2 Inst.
672.)
(1 Rep. 173 b.)

Bipartite is, when there be two parts and two parties to the deed. *Tripartite*, when there are three parts and three parties; and so of *quadripartite, quinquepartite, &c.*

A deed poll is that which is plain without any indenting, so called because it is cut even, or polled. (1) Every deed that is pleaded shall be intended to be a deed poll, unless it be alleged to be indented.

AND for that conditions are most commonly put and specified in deeds indented, somewhat shall be here said (to thee, my son) of an indenture, (2) and of a deed poll concerning condi- LITTLETON.
[Sect. 370.
229 a.]
All the parts

(1) This was called *charta de una parte*. Some deeds must be indented to be valid for the purposes for which they are used, as bargains and sales by the stat. 27 Hen. 8. c. 16. leases by persons seised in tail in right of their wives, or ecclesiastical persons by 32 H. 8. c. 28. a bargain and sale of a bankrupt's estate by the 13 Eliz. c. 7: and see 43 El. c. 18. —[Butler. Note 139.]

(2) In addition to what has been observed in note 4. to 143 b. it may be remarked, that all deeds were formerly called charters. Before the indenting of them came into use, when there were more parties interested in them, there were as many parts of them taken as there were parties interested, and one part was delivered to each of the parties; these multiplied parts were called *chartæ paricæ*, or *paricolæ*. The *chartæ paricæ*, or *paricolæ*, were superseded, in a great measure, by the *chartæ partitæ*. One part of the *chartæ partitæ* was written on a piece of vellum or parchment, beginning in the middle and continuing to the end of each side. This prevailed as early as the times of the Saxons, as appears by the will of *Æthelwyrð*, a nobleman of Kent, dated in 958; by that of Prince *Æthelstan*, eldest son of King *Æthelred* the 2d.; by a charter of archbishop *Eadsi*, made about the year 1045; and by other Saxon documents preserved in the library of Mr. Astle; in all which the parchments are cut in straight lines. Straight lines continued to be generally used till the latter end of the reign of king Henry III. Afterwards the cut through the parchment was made in a waving or undulating line; and the practice of writing an intermediate sentence, or drawing an intermediate figure, was generally disused, and the word *cyrographum* adopted. In process of time it became the practice to indent this line in small notches or angles. This practice began with the lawyers, as early as the reign of king John; but

of an indenture make but one deed; and are equally binding.
(227)*

tions. And it is to be understood, that if the indenture be bipartite, or tripartite, or quadripartite, all the parts of the indenture are but one deed in law, and every "part of the indenture is of as great force and effect, as all the parts together be (1).

229 a.
36 H. 6. 24, 25.
9 H. 6. 35. 36
H. 6. 34. 9 E.
3. 18. 9 E. 4.
18. Pl. Com.
134.

"All the parts of the indenture are but one deed in law." If a man by deed indented make a gift in tail, and the donee dieth without issue, that part of the indenture which belongeth to the donee doth now belong to the donor, for both parts do make but one deed in law.

"And every part of the indenture is of as great force, &c." This is manifest of itself, and is proved by the books aforesaid.

Indenture though sealed by the grantor only, is good.

It is to be observed, that if the feoffor, donor, or lessor, seal the part of the indenture belonging to the feoffee, &c. the indenture is good, albeit the feoffee never sealeth the counterpart belonging to the feoffor, &c.

LITTLETON.
[Sect. 371.
229 b.]
Form of an indenture in the third person.

AND the making of an indenture is in two manners. One is to make them in the third person. Another is to make them in the first person. The making in the third person is in this form:

This indenture made between R. of P. of the one part, and V. of D. of the other part, witnesseth, that the said R. of P. hath granted, and by this present charter indented confirmed to the aforesaid V. of D. such lands, &c. To have and to hold (2), &c. upon condition (3), &c. In witness whereof the parties aforesaid to these presents (4) interchangeably have put their seals. Or thus: In

(2) *Ec.* not in L. and M. nor Roh.
(3) *Ec.* not in L. and M. nor Roh.

(4) *presentibus*, not in L. and M. nor Roh.

was not adopted by the ecclesiastics till a much later period. This made the intermediate writing or drawing unnecessary; and it seems to have been abandoned about the reign of Edward III. But the practice of indenting deeds in the intermediate line remained in use till the close of the 14th century; it then seems to have declined: yet the practice of cutting a waving or undulating line at the top of the parchment, on which every deed that is not a deed poll is written, has ever since continued. If the deed contains more than one skin of parchment, only the first skin of parchment is indented. Foreign diplomatists contend, that when the parchment on which a deed is written, is cut through the intermediate word or figure in a straight line, it is properly called *chirographum*; that when it is cut through the intermediate word or figure in a waving line, it is properly called *charta undulatoria*; and that it is then only properly called *charta indenta* or *indentura*, when it is cut through the intermediate word or figure in a waving line, and that waving line is indented or notched in the manner I have mentioned. But with us, every deed, the top of which is cut in the undulating or waving manner I have mentioned is called an indenture. See Mr. Madox's Preface to his *Formulare*, and the *Nouveau Traite de Diplomatique*, vol. 1. p. 351. [Butler. Note 138.]

(1) When the several parts are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counterparts: though of late it is most frequent for all the parties to execute every part, which renders them all originals. 2 Bl. Com. ch. 20. s. 1. 296. [Butler. Note 140.] But a counterpart of a deed has been admitted to be sufficient evidence of such deed. *Eyton v. Eytton*, Prec. in Cha. 116. *Roe d. West v. Davis*, 7 East, 363.—[Ed.]

witness whereof to the one part of this indenture remaining with the said V. of D. the said R. of P. hath put his seal, and to the other part of the same indenture remaining with the said R. of P. the said V. of D. hath put his seal. Dated, &c.

**Such an indenture is called an indenture made in the third person, because the verbs, &c. are in the third person. And this form of indenture is the most sure making, because it is most commonly used, &c.* (228)*

"And the making of an indenture is in two manners, &c." 229 b.
Here is another of our author's perfect divisions. In this and the next section following Littleton doth illustrate his meaning, by setting down forms and examples which do effectually teach. 9 E. 3. 18. Vid. the books above rehearsed.

In these two forms there are to be observed (amongst other) three general parts of the same, viz. the premises, the *habendum*, and the *in cujus rei testimonium*. But hereof is spoken at large, sect. 1. 4. and 40; for Littleton speaketh not here of the delivery, but only of the context or words of the deed. Vid. 40 E. 3. 2. 7 H. 7. 14. Dyer. 28 H. 8. 19. lib. 2. fol. 4 & 5. Goddard's case. (Post, 6 a.)

"Because it is most commonly used, &c." Here it appeareth, that which is most commonly used in conveyances is the surest way. *A communi observantia non est recedendum, et minime mutanda sunt quæ certam habuerunt interpretationem. Magister rerum usus.* It is provided by the statute of 38 E. 3. cap. 4. that all penal bonds in the third *person be void and holden for none, wherein some of our books (*g*) seem to differ, but, they being rightly understood, there is no difference at all. For the statute is to be intended of bonds taken in other courts, out of the realm, and so it appeareth by the preamble of that act. And it was principally intended of the courts of Rome, and so it appeareth by Justice Hankford, in 2 H. 4. in which courts bonds were taken in the third person so as such bonds made out of the realm are void; but other bonds in the third person are resolved to be good, as well as indentures in the third person, by the opinion of the whole court in 8 E. 4. (1). 17 Eliz. Dyer 342. 1 R. 3. 14 H. 6. 28. Bab. 12 H. 4. 12. 30 Ass. 31.

THE making of an indenture in the first person is (5) as in this form. To all Christian people to whom these presents indented shall come, A. of B. sends greeting in our Lord God *everlasting. Know ye me to have given, granted, and by this my present deed indented confirmed to C. of D. such land, &c. *Or thus:* Know all men present and to come, that I, A. of B. have given, granted, and by this my present deed indented, confirmed to C. of D. such land, &c. To have (6) and to hold, &c. upon condition following, &c. In witness whereof, as well I, the said A. of B. as the aforesaid C. of D. to these LITTLETON. [Sect. 372. 230 a.] Form of an indenture in the first person. (229)*

(5) come not in L. and M. nor Roh.

(6) *et tenendum*, not in L. and M. nor Roh.

(1) See Mr. Reeves's accurate and learned history of the English Law, vol. 2. p. 67. —[Butler.]

indentures have interchangeably put our seals. *Or thus*: In witness whereof (7) I the aforesaid A. to the one part of this indenture have put my seal, and to the other part of the same indenture the said C. of D. hath put his seal, &c.

230 a. Here Littleton sets down three forms of deeds indented in the first person, *brevis via per exempla, longa per præcepta*.

LITTLETON.
[Sect. 373.
230 a.]

Indenture in the first person binding on both parties, if sealed by both, and so stated in the deed.

*230 b.

AND it seemeth that such indenture (8) which is made in the first person is as good in law, as the indenture made in the third person, when both parties have put to this their seals; for (9) if in the *indenture made in the third person, or in the first person (10) mention be made, that the grantor only hath put his seal, and not the grantee, then is the indenture only the deed of the grantor. But where mention is made that the grantee hath put to (11) his seal to the indenture, &c. then is the indenture as well the deed of the grantee as the deed of the grantor. So is it the deed of them both, and also each part of the indenture is the deed of both parties in this case.

230 b.
(2 Inst. 673.
Ante, 52 b. 2
Rol. Abr. 22.)

(230)*

Here is to be observed, that, albeit the words in this indenture be only the words of the feoffor, yet if the feoffee put his seal to the one part of the indenture, it is the deed of them both. And in this special case to make it the deed of the feoffee, it appeareth by Littleton, that mention must be made in the deed, that he hath put to his seal, for that he is no way made party to make it, being made in the first person, *but only by the clause of putting his seal thereunto. Otherwise it is of a deed indented in the third person, as before it appeareth, for there he is made party to the deed in the beginning. And Littleton's rule is true, that every part of an indenture is the deed of both parties; for, as it hath been said, both parts make but one deed in law in that case.

LITTLETON.
[Sect. 374.
230 b.]

Persons not a party to a deed may take by way of remainder, and on entering and agreeing thereto, is bound by the covenants.

ALSO, if an estate be made by indenture to one for term of his life, the remainder to another in fee upon a certain condition, &c. and if the tenant for life have put his seal to the part of the indenture, and after dieth, and he in the remainder entereth into the land by force of his remainder, &c. in this case he is tied to perform all the conditions comprised in the indenture, as the tenant for life ought to have done in his life time, and yet he in the remainder never sealed any part of the indenture. But the cause is, for that, inasmuch as he entered and agreed to have the lands by force of the indenture, he is bound to perform the conditions within the same indenture, if he will have the land, &c.

231 a. "To have the lands, &c." Here is implied an ancient maxim of the law, viz. *Qui sentit commoam sentire debet et onus, et transit terra cum onere*.

(7) *ego præfatus* A, not in L. and M. nor Roh.

(8) *que est*, not in L. and M. nor Roh.

(9) *si* not in L. and M. nor Roh.

(10) *si* added in L. and M. and Roh.

(11) *son seale* not in L. and M. nor Roh.

"Upon a certain condition, &c." Here by *this* (&c.) is implied, 230 b.
 that the condition in this case doth extend both to the estate for life, (1 Rol. Abr. 422, 474.)
 and to the remainder, but by special limitation it may extend to any
 one of them, and not to the other. And albeit he in the remainder
 be no party to the indenture (the parties thereunto only being the
 lessor and the tenant for life), yet when he in the remainder enter-
 eth and agreeth to have the lands by force of the indenture (1), he
 is bound to perform the conditions contained in the indenture. *And
 here *is also a diversity to be understood, that any stranger to the
 indenture may take by way of remainder, but he cannot in this case
 take any present estate in possession, because he is a stranger to the
 deed (2).
 (10 Rep. Doct. Ball's case, cited in Portington's case.)
 (2 Cro. 240, 399, 622.)
 *231 a.
 (231)*
 (2 Inst. 673.)
 (2 Rol. Abr. 22.)

If A. by deed indented between him and B. letteth lands to B. for life, the remainder to C. in fee, reserving a rent, tenant for life dieth, he in the remainder entereth into the lands, he shall be bound to pay the rent, for the cause and reason before yielded by Littleton. An indenture of lease is engrossed between A. of the one part, and D. and R. of the other part, which purporteth a demise for years by A. to D., and R. A. sealeth and delivereth the indenture to D., and D. sealeth the counterpart to A., but R. did not seal and deliver it. And by the same indenture it is mentioned, that D. and R. did grant to be bound to the plaintiff in twenty pound in case that certain conditions comprised in the indenture were not performed. And for this twenty pound A. brought an action against D. only, and showed forth the indenture. The defendant pleaded, that it is proved by the indenture that the demise by indenture was made to D. and R., which R. is in full life, and not named in the writ, judgment of the writ. The plaintiff replied, that R. did never seal and deliver the indenture, and so his writ was good against D. sole. And there the counsel of the plaintiff took a diversity between a rent reserved which is parcel of the lease, and the land charged therewith, and a sum in gross, as here the twenty pound is; for as to the rent they agreed that by the agreement of R. to the lease, he was bound to pay it; but for the twenty pound that is a sum in gross, and collateral to the lease, and not annexed to the land, and groweth due only by the deed, and therefore R. said he was not chargeable therewith, for that he had sealed and delivered the deed. But, inasmuch as he had agreed to the lease which was made by indenture, he was chargeable by the indenture for the same sum in gross; and, for that R. was not named in the writ, it was adjudged that the writ did abate.

36 E. 3. 8 a.
 3 H. 6. 26 b.
 (1 Rol. 474.)
 5 Rep. 16.)
 36 E. 3. 8 a.
 3 H. 6. 26 b.
 Vid. 45 E. 3.
 11, 12.

(1) So where three were enfeoffed by deed, and there were several covenants in the deed on the part of the feoffees, and only two sealed the deed, yet, because the third entered and agreed to the estate conveyed by the deed, he was bound in a writ of covenant by the sealing of his companions. 2 Roll. Rep. 63.—In 38 Ed. 3. p. 9. it is said, that if land is leased to two for years, and only one puts his seal, but the other agrees to the lease, and enters, and takes the profits with him, he shall be charged to pay the rent though he has not put his seal to the deed; but if there is a condition comprised in the deed which is not parcel of the lease, but a condition in gross, if he does not put his seal to the deed, though he is a party to the lease, he is not party to the condition.—[Butler, Note 141.]

(2) In *Salter v. Kidgley*, Carth. 76. Lord Chief Justice Holt held, that a party to a deed cannot covenant with one who is no party to it; but that one who is no party to a deed may covenant with one who is party, and oblige himself by sealing of the deed.—[Butler, Note 142.]

(232)*

25 b.

2. Circumstances requisite to a good deed.

(h) Bract. lib. 2. fol. 33, &c. and lib. 5. fol. 396. Brit. fol. 34. 66. 101.

Fleta, lib. 3. cap. 14. & lib. 6. cap. 3. 4, 5.

6. (2 Co. 5. Ante, 229 a.

2 Rol. Abr. 21.) (5 Co. 74.

76.) (1) 4 E. 2. Fines, 116.

14 E. 2. Ley 79. 4 E. 2.

Ley 78. 27 H. 6. 10. 27 H. 8.

22. F. N. B. 129 l. (5 Co. 18.)

*This word (deed) in the understanding of the common law is an instrument written in parchment or paper, (h) whereunto ten things are necessarily incident: viz. First, writing. Secondly, in parchment or paper. Thirdly, a person able to contract. Fourthly, by a sufficient name. Fifthly, a person able to be contracted with. Sixthly, by a sufficient name. Seventhly, a thing to be contracted for. Eighthly, apt words required by law. Ninthly, sealing. And tenthly, delivery. A deed cannot be written upon wood, leather, cloth, or the like, but only upon parchment or paper, for the writing upon them can be least vitiated, altered, or corrupted.

If a deed (i) be alleged in count or plea, regularly it must be showed to the court (12), to the end the court may judge whether there be apt words to make it a good contract according to the rule of law, whereof more shall be said in the Chapter of Conditions. But if *non est factum* be pleaded (13), because thereby the sealing, delivery, or other matter of fact is denied, it shall be tried by the country.

(12) "Where a deed ought to be shown. Vid. 12 H. 7. 12. 9 H. 7. 15. 9 E. 4. 53. 4 H. 7. 10. 14 H. 8. 18. 18 H. 8. 9. F. N. B. 210. E. in formedon. Dr. Leyfield's case, 10 Rep. Where a thing cannot pass without deed in respect of the nature of the things, as herbage, common in gross, &c. one ought to show deed. So in respect of the quality of the lessor, as count or plea of demise of abbot with consent of convent, T. 36 Eliz. Goffe and Thurston, mayor and commonalty, P. 5 Jac. B. R. Garnons and Kenton, master and fellows of a college, P. 9 Jac. Lord Norris's case, B. R. But yet count in ejectment of demise by husband and wife is good without showing deed, though wife cannot demise without deed, as it seems. Dy. 91. when one declares on a deed, where it is not necessary. Count in *ejectione firmæ* on demise *per scriptum indentatum* without showing, and yet good. M. 42, 43 El. B. R. Hall and Mather; and it seems that defendant shall not haveoyer. Count in debt for rent on demise of the reversion in *scriptis hic in curia prolatis*, yet the other shall not haveoyer of the testament. 1651 Fitton's case. A. covenants with B. to stand seised to the use of C. his son: the son may plead this deed without showing it, because the estate is executed by the statute. H. 11 Car. B. R. Crook, n. 12. Stockman and Hampson, M. 5 Jac. C. B. So it seems, if it was with the party himself. M. 6 Jac. C. B. Debt on obligation by commissioners of bankrupt good without showing deed. H. 6 Car. B. R. Crook, n. 5. Gay and Fielder." Hal. MSS. See further on *showing of deeds* and *oyer* in Com. Dig. Pleader, O. P. Wils. vol. 1. part 1. page 121. vol. 2. page 1. and Sheph. Touch. 73. but most fully in Vin. Abr. Fails, M. a. to M. a. 32.—[Hargr. n. 6. 35 b. (220).]

[See 232 a. ant. p. 112. n. (13). 1 Selw. N. P. 4th ed. 475 n.]—[Ed.]

(13) "Where to plead *non est factum*. Dy. 112. In case of *sigillum avulsum* before issue, one may plead *non est factum*. 7 H. 6. 18. If a deed be suspicious by rasure or avulsion of seal, the party on oyer of deed may demur, and put it into the judgment of the court, or plead *non est factum*. T. 40 El. B. R. Rot. 202. Obligation with condition to save harmless against Tracey with a blank: a stranger after delivery fills up the blank with christian name by consent of the obligor; yet adjudged to avoid the deed, because material. But if the addition is not material, as the addition of a county, and it be by a stranger, it doth not avoid the deed, though if by the party himself it doth avoid it. Vid. H. 43 Eliz. Cam. Scacc. the case of Fox and Markham. Vid. Noy, fol. 112. n. 487. A. B. and C. are bound jointly and severally: the seal of A. is torn off; in debt against B. he may plead *non est factum*. But if A. B. and C. covenant severally, and the seal of A. is torn off, it will not avoid against the others. 5 Rep. 23. Vide *where by rasure of the deed the interest is lost*. Where a thing may pass without deed, as in case of seoffment or lease, though the deed be rased, the interest continues. H. 10 Car. B. R. Crook, n. 8. Miller and Manuaring. But if lease by abbot and convent be interlined by lessee, the interest is destroyed. H. 9 Eliz. rot. 1056 Bendl. Arden and Michell." Hal. MSS.—See further as to pleading *non est factum* to a deed. Sheph. Touchst. 74. and Vin. Abr. Fails, N. a. and as to rasure and alteration of deeds and breaking off seals, Sheph. Touchst. 68, 69. Vin. Fails, T. to Z. and Com. Dig. Fail, F.—[Hargr. n. 7. 35 b. (221).]

[And see 1 Selw. N. P. 517.]—[Ed.]

*And here it is to be understood, that it ought to be in parchment or in paper. For if a writing be made upon a piece of wood, or upon a piece of linen, or in the bark of a tree, or on a stone, or the like, &c. and the same be sealed or delivered, yet it is no deed, for a deed must be written (н) either in parchment or paper, as before is said, for the writing upon these is least subject to alteration or corruption (r).

(233)*
229 a.
Writing on parchment or paper. (Ante, 36 b. 36 a.) 14 E. 3. Ley. 79 4 E. 2. Fines, 116. 4 E. 2. Ley 68. 2 R. 2. Det. 4. 27 H. 6. 9. F. N. B. 1221. (2 Rol. Abr. 21.)

7 a.
Sealing.

The sealing of charters and deeds is much more ancient than some out of error have imagined (14); for the charter of king Edwin, brother of king Edgar, bearing date *anno Domini* 956, made of the land called Jecklea, in the Isle of Ely, was not only sealed with his own seal (which *appeareth by these words, *ego Edwinus gratia Dei totius Britannicæ telluris rex meum donum proprio sigillo confirmavi*), but also the bishop of Winchester put to his seal, *ego Ælfwinus, Winton, ecclesiæ divinus speculator, proprium sigillum impressi*. And the charter of king Offa, whereby he gave the Peter pence, doth yet remain under seal. But no king of England before or since the Conquest sealed with any seal of arms before king R. 1., but the seal was the king sitting in a chair on the one side of the seal, and on horseback on the other side, in divers forms. And king R. 1. sealed with a seal of two lions, for the Conqueror of England bare two lions. And king John, in the right of Aquitaine (the duke whereof bare one lion), was the first that bare three lions, and made his seal accordingly, and all the kings since have followed him. And king E. 3. in *anno* 13 of his reign, did quarter the arms of France with his three lions, and took upon him the title of king of France, and all his successors have followed him therein (κ).

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(14) See further as to the antiquity of Nichols. Engl. Histor. Libr. 2d ed. 241.—sealing deeds, in Seld. Jan. Angl. b. 2. c. 2. [Hargr. n. 4. 7 a.] Mad. Form. Anglic. Dissert. p. 27. and

(н) Or printed, for it may be in any language or character. 2 Bl. Com. 297.—[Ed.]

(r) Wood or stone may be more durable, and linen less liable to erasures, but writing on paper or parchment unites in itself more perfectly than any other way, both those desirable qualities, for there is nothing else so durable, and at the same time so little liable to alterations; nothing so secure from alteration, that is at the same time so durable. 2 Bl. Com. 297.

All the matter and forms of a deed must be written before the sealing and delivery of it. For, if a man seals and delivers an empty piece of parchment or paper, though he, at the same time, gives directions that an agreement shall be written above, which is accordingly done, yet it will be void as a deed. Sheph. Touch. 54. Perk. s. 118. But an alteration, erasure, or interlineation, made in any part of the deed before it is delivered, will not hurt the deed; though in such cases it is right to mention it in the attestation. Sheph. Touch. 55. *Page v. Page*, 2 Cha. Rep. 187.

A deed must have the regular stamps imposed on it by the several statutes for that purpose, otherwise it cannot be given in evidence. 2 Bl. Com. 297. Fearne's Post. Works, 111. A deed also must be read whenever any of the parties require it; if not, the deed will be void as to the party requiring it to be read. If a person can, he should read it himself; and if he be blind or illiterate, some other should read it for him. If it be read falsely, it will be void; at least for so much as was misread; unless it be agreed by collusion that the deed should be read falsely, on purpose to make it void: for, in such case, it will bind the fraudulent party. *Manser's case*, 2 Co. 3. *Thowroughgood's case*, Id. 9. 4 Cru. Dig. 37.—[Ed.]

(κ) See ant. vol. 1. p. 69. n. (c).—Sealing and delivery are essential to a deed; which,

36 a.

Delivery. of a deed as an escrow, if made to the party himself, is an absolute delivery: (2 Rol. Abr. 26. 9 Co. 137. Noy. 50. 11 Cro. Jam. 88.) 25 Ass. pl. 11. Tr. 29 H. 8. Dyer 95. (1 Cro. Eliz. 335. Hob. 246. Dy. 34 b. N. Ben. 75. 1 & 4 Cro. Eliz. 884. 1 Raym. 197. Ow. 56. Dy. 122b. Dal. 104.) (235)*

If a man deliver a writing sealed, to the party to whom it is made, as an escrow to be his deed upon certain conditions, &c. this is an absolute delivery of the deed, being made to the party himself; for the delivery is sufficient without speaking of any words (otherwise a man that is mute could not deliver a deed), and tradition is only requisite, and then when *the words are contrary to the act which is the delivery, the words are of none effect, *non quod dictum, sed quod factum est, inspicitur*. And hereof though there hath been (k) variety of opinions, yet is the law now settled agreeable to judgments in former times, and so was it resolved by the whole court of common pleas (15). But it may be delivered to a stranger, as an escrow (L), &c. because the bare act of delivery to him without words worketh nothing (16). And this is the ancient diversity (I) in our books, the record whereof I have seen agreeable with the reason of our old books (17). And as a deed may be delivered to

(15) In Mo. 697, there is an opinion of some judges in 39 Eliz. to the contrary; but the authorities since are with Lord Coke. See acc. Mo. 642. Noy. 6. Hob. 246. 9 Co. 137. Sty. 251. 6 Mod. 218.—[Hargr. n. 3. 36 a.]

(16) See Dy. 167 b.—[Hargr. n. 4. 35 a.]

(17) “Nota, if dean and chapter seal a

deed, it is their deed immediately; but if at the same time they make letter of attorney to deliver it, this is not their deed till delivery. T. 21 Jac. B. R. rot. 662. *Hayward and Pulcher*.” Hal. MSS. As to the former point, see acc. Dav. 44. 2 Leon. 97. and Cro. Eliz. 167, and as to the latter point the case cited by Lord Hale in W. Jo. 170.

if delivered, may be a good deed, whether signed or not. But if it is to be executed under a power, with signature and sealing, both are required. *Wright v. Wakeford*, 17 Ves. 459. And in most cases signing is necessary; for it is enacted by the statute of frauds and perjuries, 29 Cha. 2. c. 3. that all leases, estates, interests of freehold or terms for years, or any uncertain interests in or out of lands or tenements, not put in writing and signed by the parties making them, or their agents authorized by writing, shall have no greater effect than as estates at will; except leases not exceeding three years from the making thereof, whereupon the rent reserved shall be two-thirds at least of the full improved value of the thing demised: and no such estates or uncertain interests, not being copyhold, &c. shall be assigned, granted, or surrendered, unless by deed or note in writing, signed as aforesaid, or by act and operation in law.

If another person seals the deed, yet, if the party delivers it, he thereby adopts the sealing, and, by a parity of reason, the signing also, and makes them both his own. *Perk. s. 130. 2 Bl. Com. 307*. And if the party seal the deed with any seal besides his own, or with a stick, or any such like thing which does make a print, it is good. And, though it be a corporation that makes the deed, yet they may seal with any other seal besides their common seal. And if there be twenty to seal one deed, and they all seal upon one piece of wax and with one seal, yet if they make distinct and several prints, this is a sufficient sealing, and the deed is good enough. *Sheph. Touch. 57*.

A person may appoint another to be his attorney to execute a deed for him. But, in such case, it must be executed in the name of the principal. *Frontin v. Small*, *Stra. 705*.

—[Ed.]

(L) In the delivery of a deed as an escrow, two things must be attended to.—1st. That the form of words used in the delivery of the deed, as an escrow, be apt and proper:—As “I deliver this to you as an escrow to deliver to the party as my deed, upon condition that he deliver to you the sum of 20*l*. for me,” &c. And 2dly. That the deed be delivered to a stranger, and not to the party himself, to whom it is made. *Sheph. Touch. 58. 9 Co. 137 a*. Where a deed is delivered as an escrow, it is of no force till the condition is performed; and, though the party to whom it is made should get it into his possession before the performance of the condition, he can derive no benefit from it. But if either of the parties should die before performance of the condition, and afterwards the condition is performed, the deed is good, and will take effect from the first delivery: for there was *traditio inchoata* in the life-time of the parties; *et postea consummatio existens*, by the performance of the condition. *Sheph. Touch. 59*.—[Ed.]

the party without words, so may a deed be delivered by words without any act of delivery (18), as if the writing sealed lieth upon the table, and the feoffor or obligor saith to the feoffee or obligee, Go, and take up the said writing, it is sufficient for you, or it will serve the turn; or, Take it as my deed, or the like words, it is a sufficient delivery (19) (M).

(A) Tr. 43 Eliz. inter Hawkesby & Lacher in the King's Bench. Hill. 12 Ja. II. in the Common place. (5 Co. 119 b.) Secus, if made to a stranger.

(Q) 13 H. 8. 19 H. 8. 8. 4 E. 3. 18. 13 H. 4. 8. (3 Co. 26 b. 1 Leon. 140. 2 Rol. Abr. 24.) Delivery may be made without words; or by words without an act of delivery.

(N) Note, that purchasers of lands, tenements, leases, and hereditaments, for good and valuable consideration, shall avoid all former

3 b.
Consideration.

and Palm. 504. according to which the court was divided in opinion.—[Hargr. n. 5. 36 a. (223).]

[See ante, vol. 1. p. 185. n. (c).]—[Ed.]

(18) "The obligor seals obligation, and throws it upon the table without other circumstances; this is not a delivery. But if he throws it towards the obligee, or if the obligee immediately takes it, and the obligor says nothing, it is a delivery. M. 29. and 30. Eliz. Rot. 636. *Stanton and Chambers*." Hal. MSS.—See S. C. in Ow. 95. Cro. Eliz.

122. Dy. ed. 1688. fo. 192 b. in marg.—[Hargr. n. 6. 36 a. (223).]

(19) "T. 3 Eliz. *Gibson v. Tenant*, Beadl. n. 140." Hal. MSS.—See S. C. in N. Bendl. 92. and Dy. 192. See further as to the delivery of deeds, Shep. Touchst 57. Com. Dig. *Fait*, A. 3. Win. Abr. *Faits*, I. and K.—[Hargr. n. 7. 36 a.]

[That circumstance alone without an actual delivery, may be equivalent, and amount to a delivery, see *Goodright v. Straphan*, 1 Cowp. 204.]—[Ed.]

(M) A deed may be delivered to the party himself to whom it is made, or to any other person, by sufficient authority from him; or it may be delivered to any stranger, for, and on behalf, and to the use of him to whom it is made, without authority. But if it be delivered to a stranger, without any such declaration (unless it be in case of a delivery as an escrow), it seems it will not be a sufficient delivery. Shep. Touch. 57.

A deed cannot be delivered twice: for if the first delivery has any effect, the second will be void. Thus if an infant, or a person under duress of imprisonment, delivers a deed (in which case the deed is not void, but only voidable), and after, the infant being of full age, or the person who was under duress being at large, do deliver the deed again, such second delivery is void. But where a feme covert seals and delivers a deed, and after her husband's death delivers it again, the second delivery is good, because the first was void. Sheph. Touch. 60. *Goodright v. Straphan*, 1 Cowp. 201. Ant. p. 219. n. (F). In the case of the king's letters patent, or of grants under the seal of the dutchy of Lancaster, the seal is matter of record, and therefore the deed needs no delivery. And the deeds of a corporation to which their seal is affixed, need not in general be delivered. *Willis v. Jermin*, Cro. Eliz. 167. 4 Cru. Dig. 31.—[Ed.]

(N) By the common law, it is not absolutely necessary that any consideration should be expressed: for, although a verbal contract is not binding without a consideration, because words often pass from men lightly and inconsiderately, which may justify a suspicion of imprudence, and even of fraud; yet where an agreement is made by deed, which must necessarily be attended with more thought and deliberation, all suspicion of surprise or deceit is excluded: and therefore every deed in itself imports a consideration, though it be only the will of the maker, and therefore shall never be said to be *nudum pactum*. Plowd. 308. 3 Bur. 1637.

There are two kinds of considerations, civil and moral. The first, which is usually called a valuable consideration, is money, or any other thing that bears a known value. Marriage, also, forms a valuable consideration. The second, which is called a good consideration, arises from an implied obligation, such as that which subsists between a parent and child; for children are considered, in equity, as creditors claiming a debt, founded upon the moral obligation of the parent to provide for his child. The love and affection which a man is naturally supposed to bear to his brothers and sisters, nephews and nieces, and heirs at law, and the desire of preferring his name and family, are also held to be good considerations. In like manner the payment of a man's debts is deemed a good consideration; since every man is under a moral obligation of satisfying his lawful creditors. Fonbl. Eq. b. 1. c. 5. s. 1.—[Ed.]

Deeds and conveyances may be avoided in case of fraud:

(Post. 76 a.)
(236)*

(m) 27 Eliz. cap. 4. 13 Eliz. cap. 5. 3 Co. 80. 82. 83.

Twine's case. 5 Co. 60.

Gooche's case. 6 Co. 72.

Burrell's case. 11 Co.

74. Pasch. 12

Ja. inter

Jones, Pl. and

Sir Rich.

Groobham,

def. in ejec-

utione firmæ

in evidence

al Jurie.

(237)*

fraudulent and convinous conveyances, estates, grants, charges, and limitations of uses, of or out of the same, (m) by a statute made since Littteton wrote (20), whereof you may plainly and plentifully read in my Reports, to which I will add this case. J. C. had a lease of certain lands for sixty years, if he lived so long, and forged a lease for ninety years absolutely, and he by indenture reciting the forged lease, for valuable consideration, bargained and sold the forged lease and all his interest in the land to R. G. It seemed to me that R. G. was no purchaser within the statute of 27 Elizabeth, for he contracted not for the true and lawful interest, for that was not known to him, for then perhaps he would not have dealt for it, and the visible and known term was forged; and although by general words the true *interest passed, notwithstanding he gave no valuable consideration nor contracted for it. And of this opinion were all the judges in Serjeants Inn, in Fleet Street (o).

(20) For cases of fraudulent gifts before the 13 Eliz. c. 5. see Dy. 294 b. 295 a.— [Hargr. n. 9. 3 b.]

(o) The deeds and conveyances affected by the statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4. (made perpetual by 30 Eliz. c. 18. s. 3.) are, 1st. Deeds or conveyances, made with an express intention to defraud creditors or subsequent purchasers. 2d. Deeds or conveyances made without any consideration, usually called voluntary conveyances. 3d. Deeds or conveyances made for good, but not for valuable considerations, such as deeds made to provide for a man's wife, children, or relations. 4 Cru. Dig. 373.

1st. With respect to deeds made with intent to defraud creditors and purchasers, they are clearly void, whatever may be the consideration, and though the conveyance be made to the king. *Magdalen College case*, 11 Co. 66. And in *Twine's case*, (3 Co. 80), a leading case on this subject, the badges of fraud were, 1st. The conveyance was of all the grantors' property, without exception of his apparel, or any thing of necessity. 2d. The donor continued in possession. Et vid. *Reid v. Blades*, 5 Taunt. 212. *Dewey v. Bayntun (Bart.)*, 6 East, 257. 3d. The conveyance was made in secret. 4th. There was a trust between the parties. Et vid. 11 Co. 74 a. *Tarback v. Marbury*, 2 Vern. 510. Though in conveyances of land, it seems, that, where the consideration is future, the donor's continuation in possession is not fraudulent; unless it be expressly proved that fraud was intended. *Stone v. Grubham*, 1 Rol. Rep. 3. And where a debtor being sued by a creditor, pending the suit and before execution, being insolvent, executed an assignment of all his effects to trustees for the benefit of all his creditors, under which possession was immediately taken, it was held that the assignment was not fraudulent within the 13 Eliz., although made to the intent to delay the plaintiff of his execution. *Pickstock v. Lyster*, 3 Maul. & S. 371. Et vid. *Estwick v. Cailland*, 5 T. R. 420. Anst. 381. *Nunn v. Wilmore*, 8 T. R. 521. *Holbird v. Anderson*, 5 T. R. 235. *Meux, q. t. Howell*, 4 East, 1. With respect to the circumstances from which an intent to defraud a subsequent purchaser may be collected, the conveyance to such purchaser has been held sufficient to show, that there was a fraudulent intent at the time when the first conveyance was made; and will therefore invalidate such first conveyance, as to the subsequent purchaser. And in order to bring a case within the statute 27 Eliz., it is not necessary that the person who sells the land, should make the former conveyance. *Burrell's case*, 6 Co. 72. And though the subsequent purchaser should have notice of the preceding conveyance, yet he will be allowed to invalidate it. 5 Co. 60 b. Cowp. 711. *Doe d. Otley v. Manning*, 9 East, 59. *Hill v. The Bishop of Exeter*, 2 Taunt. 69. Et vid. *Pulvertoft v. Pulvertoft*, 18 Ves. 84. *Metcalf v. Pulvertoft*, 1 Ves. & B. 183, 184. *Buckle v. Mitchell*, 18 Ves. 100.

2d. With respect to voluntary conveyances, there is a difference, says Lord Hardwicke, 2 Ves. 101, between the stat. 13 Eliz. in favour of creditors, and that of the 27 Eliz. in favour of purchasers. For, on the 27 Eliz., every conveyance made, where there is a subsequent conveyance for a valuable consideration, though no fraud in that voluntary conveyance, nor the person making it at all indebted, yet the determinations are, that such mere voluntary conveyance is void at law, by the subsequent purchase for a valuable consideration. But the difference between that and the 13 Eliz. is this: if there is a voluntary

(n) In ancient time, when a man made a fraudulent feoffment, it (238)
 was said, *quod possuit terram illam in brigam*; *where brigam (239)*
 (n) HIL. 18. E.

conveyance of real estate, or chattel interest, by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appears, that will make it void; otherwise not, but it will stand, though he afterwards becomes indebted. But I know of no case, on the 13 Eliz. says his lordship, where a man, indebted at the time, makes a voluntary conveyance to a child without consideration, and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors.

3d. With respect to conveyances made for good considerations, that is, in favour of a wife, children, or near relations, they are also within these statutes, and are considered as fraudulent against creditors (*Apharry v. Bodingham*, Cro. Eliz. 350.) and subsequent purchasers. *Woodie's case*, cited in Cro. Jac. 158. *Goodright v. Moses*, 2 Bl. Rep. 1019. *Chapman v. Emery*, Cowp. 279. And a voluntary settlement, though free from actual fraud, and meritorious, as a provision for relations, will be void against a subsequent purchaser for valuable consideration with notice, whether by conveyance or articles. *Buckle v. Mitchell*, 18 Ves. 100. *Doe, d. Otley v. Manning*, 9 East, 59. And in such cases a court of equity will not restrain the husband, by injunction, from selling; neither can the purchase-money be laid hold of in favour of claims under a previous settlement, void under the stat. 27 Eliz. as being voluntary. 18 Ves. 91.

By the 5th section of the 27 Eliz. conveyances with power of revocation are declared void as against a subsequent conveyance, or charge, *Standen v. Bullock*, 3 Co. 89 b. 1 Sid. 133; and it seems quite immaterial whether the settlement itself is merely voluntary, or upon valuable consideration, Sugd. Vend. 3d. ed. 491. Rob. Conv. 637: but where a power of revocation is inserted in a conveyance, which can only be exercised with the consent of persons who are not under the control of the settler, such conveyance will not be considered as within this act. *Buller v. Waterhouse*, 2 Jo. 94. 2 Show. 46. Booth's Op. 1 Coll. Jur. 426. With respect to the persons who are deemed purchasers under the 27 Eliz., they must be purchasers for money, or other valuable consideration. *Twine's case*, 3 Co. 83 a. Et vid. 2 Atk. 601. *Upton v. Bassett*, Cro. Eliz. 445. Marriage has been held to be a sufficient consideration. *Douglas v. Ward*, 1 Ch. Ca. 99; but a conveyance to a man's children, or to his wife after marriage, by way of jointure, will not enable them to avoid a preceding conveyance. *Upton v. Bassett*, supra. A mortgagee is a purchaser under the stat. 27 Eliz.; as also a lessee at a rack-rent. *Chapman v. Emery*, supra. *Goodright v. Moses*, supra. But where the price is very inadequate, or there are other circumstances indicating a fraudulent collusion between the purchaser and the vendor, to avoid a preceding conveyance, a purchaser will not be entitled to the benefit of this statute. *Doe v. Routledge*, Cowp. 705. Et vid. *Metcalfe v. Pulbertoft*, 1 Ves. & B. 193, 184. The title of a purchaser for a valuable consideration, however, cannot be defeated by a prior voluntary settlement of which he had no notice, though he purchased of one who had obtained a conveyance by fraud, but of which fraud he, the purchaser, was ignorant. *Doe, d. Bethell v. Martyr*, 1 N. R. 332. It appears from the case above mentioned by Lord Coke, that to entitle himself to the benefit of the stat. 27 Eliz. the party must be a purchaser of an existing lawful interest. Sugd. Law of Vend. 480.

It remains only to observe that each of these statutes contains a proviso in favour of conveyances made upon good consideration and *bona fide*. Settlements in consideration of an intended marriage have always been held to be within this proviso, as being made for a valuable consideration. Plowd. 58. *Kirk v. Clark*, Prec. in Ch. 275. And the consideration of marriage extends to persons not directly within it, viz. to brothers, uncles, and other relations, upon the marriage of a son; as being within the contract between him and his father. *Pulbertoft v. Pulbertoft*, 18 Ves. 92. And a settlement, executed after marriage, if made in pursuance of a bond (*Jason v. Jarvis*, 1 Vern. 286), or other agreement before marriage, *Hylton v. Biscoe*, 2 Ves. 308; upon payment of money as a portion, *Stileman v. Ashdown*, 2 Atk. 279. *Jones v. March*, For. 63. *Wheeler v. Caryl*, Ambl. 121; or a new additional sum of money; or even upon an agreement to pay money provided it be afterwards paid; will be equally valid, both at law and equity, against creditors, as well as purchasers. *Brown v. Jones*, 1 Atk. 190. Et vid. *Ex parte Hall*, 1 Ves. & B. 112. And where a wife joins with her husband in destroying the settlement made on her marriage, and a new settlement is made, such new settlement will be good, though a better provision is made for the wife and children than was contained in the original settlement. *Scott v. Bell*,

3. *Coram rege*
in *Thesaur.*
or *usury*.
(o) 37 H. 8.
cap. 6. 13
Eliz. cap. 8.
5 Co. 69.
(240)*

doth signify wrangle, contention, or intricacy, for fraud is the mother of them all. (o) And on the other *side, purchases, estates, and contracts, may be avoided, since Littleton wrote, by certain acts of parliament against usury above ten in the hundred, in such

2 Lev. 70. *Drill v. Burnford*, Prec. in Ch. 113. And the better opinion, as well upon principle as in point of authority, says Mr. Sugden (in his excellent work on the Law of Vendors, 2d. edit. p. 495), seems to be, that the wife joining in barring her dower, for the benefit of her husband, will be a sufficient consideration for a settlement on her. *Lavender v. Blackstone*, 2 Lev. 146. Et vid. *Evelyn v. Templar*, 2 Bro. C. C. 148. 18 Ves. 87. 93. And where a husband after marriage conveyed an estate to trustees, for the separate use of his wife, the covenants by the trustees to indemnify the husband against the debts, which the wife might contract, after the separation, were held to be a valuable consideration, and that the settlement was good against a prior creditor. *Stephens v. Olive*, 2 Bro. C. C. 9. *King v. Brewer*, Ibid. 93 n. Sed vid. *Lord St. John v. Lady St. John*, 11 Ves. 526. A settlement, before marriage, even of moveable effects by a person indebted at the time will be good against creditors. *Cadogan v. Kennett*, Cowp. 432. Et vid. *Jarman v. Woollaton*, 3 T. R. 618. *Haselinton v. Gill*, 3 T. R. 620, n. Nor is it necessary that the husband should receive a portion with his wife, *Browne v. Jones*, 1 Atk. 190; and the fact of her knowing him to be indebted at the time will not invalidate the transaction. *Wheeler v. Caryl*, Amb. 121. *Nairn v. Prowse*, 6 Ves. 759. And if real estate form part of the settlement, and, after the marriage, the husband build on the land, or enfranchise copyholds included in the settlement, yet the creditors cannot have the benefit of these acts by way of charge against the wife. *Campion v. Cotton*, 17 Ves. 271. So if a bond is given on marriage and receipt of a portion, conditioned to pay a sum beyond the marriage portion, in case of death, or insolvency, such bond is good, so far as relates to the property received with the wife, but beyond that is fraudulent as against creditors, *Ex parte Meaghan*, 1 Sch. & Lef. 179, and *Ex parte Murphy*, Ibid. 44; overruling what is said by Lord Kenyon in *Staines v. Plank*, 8 T. R. 389. And a settlement by a widow, on her children, previous to her second marriage, with her husband's consent, has been held good against a subsequent purchaser. *Newstead v. Searles*, 1 Atk. 265. *King v. Cotton*, 2 P. Wms. 674. A settlement after marriage, in favour of a wife and children, by a person not indebted at the time, and not being a trader, (st. 1 Jac. 1. c. 15. s. 5. *Lilly v. Osborn*, 3 P. Wms. 298. *Fryer v. Flood*, 1 Bro. C. C. 160), is good against subsequent creditors. *Stephens v. Olive*, 2 Bro. C. C. 9. *Montague v. Lord Sandwich*, cited 12 Ves. 148. 155. *Kidney v. Coussmaker*, 12 Ves. 136—156. And though a settlement after marriage (and a marriage in Scotland is sufficient, *Ex parte Hall*, 1 Ves. & B. 112.), is fraudulent against such persons as were creditors at the time the settlement was made, *Middlecombe v. Marlowe*, 2 Atk. 520. *White v. Sansom*, 3 Atk. 413. *Kidney v. Coussmaker*, 12 Ves. 155; yet it is otherwise, if such settlement contain a provision for debts, *George v. Milbank*, 9 Ves. 104; or is in pursuance of articles before marriage, *Beaumont v. Thorpe*, 1 Ves. 27; or if the husband was only indebted in a single debt, *Lush v. Wilkinson*, 5 Ves. 387; or if the debt be secured by mortgage, in which case it will not effect the settlement, *Stephens v. Olive*, 2 Bro. C. C. 30; but (with these exceptions) if there be creditors at the time of such settlement, and the settlement is on that account declared fraudulent, the property so settled becomes part of the assets, and all subsequent creditors are let in to partake of it. *Taylor v. Jones*, 2 Atk. 600. Et vid. *Dundas v. Dytens*, 1 Ves. jun. 198. *Montague* and *Lord Sandwich*, 12 Ves. 156 n.; and in one case a subsequent creditor filed what is called a fishing bill, in order to prove debts antecedent to the settlement, and thus establish a fund for the payment of his own debt. *Lush v. Wilkinson*, 5 Ves. 384. Et vid. *Kidney v. Coussmaker*, 12 Ves. 155.

Lastly, it is observable, that the 27 Eliz. which was passed in favour of purchasers, only affects real estate; and the 13 Eliz., which affects personal estate, is in favour of creditors, and does not extend to the case of a purchaser. *Danbeny v. Cockburn*, 1 Meriv. 636. And both these statutes only avoid voluntary conveyances as against creditors and subsequent purchasers; but they are binding on the party making the same, and all persons claiming under him. 1 Fonbl. Eq. b. 1. c. 4. s. 12. Et vid. *Curtis v. Price*, 12 Ves. 103. *Pulvertoft v. Pulvertoft*, 18 Ves. 92. *Whalley v. Whalley*, 1 Meriv. 436. And if a man makes a voluntary conveyance of land, and the alienee sells the same for a valuable consideration, the land is bound. *Sagittary v. Hyde*, 2 Vern. 44. *Prodgers v. Langham*, 1 Sid. 133. *Doe v. Murtyr*, 1 N. R. 332. *Far v. Eliason*, 1 East, 92. And this rule has been applied to persons having only equitable rights. See *George v. Milbank*, 9 Ves. 190. And if a voluntary grantee gain credit by the conveyance to him, and a person is induced

manner and form as by those acts is provided; which statutes are well expounded in my books of Reports, which may be read there. To them that lend money my caveat is, that *neither directly nor indirectly, by art, or cunning invention, they take above ten (21) in the hundred; for they that seek by sleight to creep out of these statutes, will deceive themselves, and repent in the end.

There have been eight formal or orderly parts of a deed of feoffment (22); viz. 1. the *premises* of the deed implied by Littleton (sect. 1.); 2. the *habendum*, whereof Littleton (sect. 1.) speaketh; 3. the *tenendum*, mentioned by Littleton; 4. the *reddendum*: 5. the *clause of warranty*; 6. the *in cujus rei testimonium*, comprehending the sealing; 7. the date of the deed, containing the day, the month, the year, and stile of the king, or of the year of our lord; (p) lastly, the clause of *hiis testibus*; and yet all those parts were contained in very few and significant words (q), *hæc fuit candida illius ætatis fides et simplicitas, quæ pauculis lineis omnia fidei firmamento posuerunt.*

The office of the *premises* of the deed is two-fold; first, rightly to name the feoffor and the feoffee; and secondly, to comprehend the certainty of the lands or tenements to be conveyed by the feoffment, either by express words, or which *may by reference be reduced to a certainty: for *certum est quod certum reddi potest* (r). The *habendum* hath also two parts, viz. first, to name again the feoffee; and secondly, to limit the certainty of the estate.

(r) If in the premises lands be letten, or a rent granted, the general intendment is, that an estate for life passeth; but if the *habendum* limit the same for years, or at will, the *habendum*

(21) Since Sir Edward Coke's time, the rate of interest has been gradually reduced to 5 per cent. See 21 Ja. 1. c. 17. 12 Cha. 2. c. 13. and 12 Ann. st. 2. c. 16. But a greater rate of interest is still allowable in Ireland and our Plantations. It has been doubted whether the 12 Ann. did not extend to money lent on lands in Ireland or our plantations, where the mortgage is executed in Great Britain: but the 14 Geo. 3. c. 79, declares all such securities made previously to that act to be valid, notwithstanding the 12 Ann. where the interest is not more than the established rate of the particular place; and that all *future* securities of a like kind shall also be valid, where the interest is not

more than 6 per cent. It is impossible in the compass of a note to cite the numerous cases on the statutes of Usury. One of the most remarkable for the great learning and variety of the arguments is that of the *Earl of Chesterfield and Janssen*, 1 Atk. 301. and 2 Ves. 325.—[Hargr. n. 1. 4 a. (18).]

[See ante, p. 15. n. (p).]

(22) See the observations on this part of the Commentary in Mad. Form. Angl. Disser. p. 5. See also on the subjects of ancient deeds and charters, the whole of the same Dissertation, and Nich. Engl. Hist. Libr. 2d. ed. 240. Seld. Jan. Angl. b. 2. c. 2 and 3, to which may be added *Mabillon de Re Diplomatica*.—[Hargr. n. 5. 6. a.]

to marry him on account of such provision, the deed, though void in its creation as to purchasers, will, on the marriage being solemnized, no longer remain voluntary, but will be considered as made upon valuable consideration. *Prodgers v. Langham*, supra. Ed vid. 9 Ves. 193. *Brown v. Carter*, 5 Ves. 862.—[Ed.]

(p) The premises of a deed contain all that part which precedes the *habendum*, that is, the date, the parties' names and descriptions, the recital, the consideration and receipt thereof, the grant, the description of the things granted, and the exception, if any. 4 Cru. Dig. 33.—[Ed.]

Button's case. Idem. lib. 7. Claiton's case. (Lutw. 271.) *4 a. (5 Co. 69.)

6 a. 3. The formal parts of a deed. Vid. sect. 40 & 370, 371. many things de caris et factis. Fleta, lib. 3. cap. 14. Britton, 100, 101. Bract, lib. 5. fol. 396 a. 399. 38 H. 6. 23. 36. Pl. Com. Wrottesley's case, fol. 96. (p) Vid. Throgmorton's case, Pl. Com. (q) 6 Co. 43. In Sir Anthony Mildmay's case. Vid. sect. 278. (2 Rol. Ab. 23.)

The premises. (241)* Habendum.

183 a. May control the general intendment of the premises. (r) Pl. Com.

in Throgmorton's case. (2 Co. 23. 55. 5 Co. 111. 2 Rol. Abr. 65.) doth qualify the general intendment of the premises. And the reason of this is, for that it is a maxim in law, that every man's grant shall be taken by construction of law most forcible against himself.

182 b. If a lease be made (s) to two, *habendum* to the one for life, the remainder to the other for life, this doth alter the general intendment of the premises (23), and so hath it been oftentimes resolved. And so it is if a lease be made to two, *habendum* the one moiety to the one, and the other moiety to the other, the *habendum* doth make them tenants in common; and so one part of the deed doth explain the other, and no repugnancy between them, *et semper expressum facit cessare tacitum* (24) (q).

6 a. The *tenendum* at this day, where the fee-simple passeth, *must be of the chief lords of the fee (r). And of the *reddendum* more shall be said in his proper place, in the Chapter of Rents (s). Of the *clause of warranty* more shall be said in the Chapter of Warranties. *In cujus rei testimonium sigillum meum apposui* was added, for the seal is of the essential part of the deed. The date of the deed many times antiquity omitted; and the reasons thereof was, for that the limitation of prescription, or time of memory, did

(23) Acc. Perk. sect. 174.—[Hargr. n. 2. See also 2 Co. 55 a. and b. Ante, 180 b. 183 b.] (vol. 1. p. 798, 799.) 189 a. (vol. 1. p. 758,

(24) Acc. sec. 298. (ant. vol. 1. p. 772.) 759.) post, 299 b.—[Hargr. n. 3. 183 b.]

(q) Where the *habendum*, as in the above instances, is not absolutely inconsistent with the grant in the premises, it will qualify the grant; but where it is inconsistent with the grant in the premises, as if a grant be made to A. and his *heirs*, *habendum* to him for his life, or to him and his executors for years; the grant in the premises will prevail, and the *habendum* be rejected. Sheph. Touch. 98. 2 Prest. Conv. 439, 440. But the courts will modify in construction the different parts of the assurance, so as to carry the intentions of the parties into effect, as far as that can be done consistently with the rules of law. And therefore in the late case of *Spyre v. Topham*, where there was a grant to one person with an *habendum* to another person; the court decided, that in construing the conveyance, the grant which was repugnant to the *habendum* should be rejected as surplusage, and the *habendum* be supported. 3 East, 115. See further, with regard to the *habendum*, Vin. Abr. Grant, I. K. L. and M. Prest. Ess. on Abstr. p. 98, and a note by Mr. Powell in his edition of Wood's Conveyancing, in which the law, with regard to the *habendum*, is concisely and accurately stated.—[Ed.]

(r) The *tenendum* is now of very little use, and is only kept in by custom. It was formerly used to express the tenure by which the estate granted was to be held; viz. *tenendum per servitium militare*, in *burgagio*, in *libero socagio*, &c. But, all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *Quia emptores* 18 Edw. 1. it was also sometimes used, to denote the lord of whom the land should be held; but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* has been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be held *de capitalibus dominis feodi*, Madox. Formul. passim; but, as this expressed nothing more than the statute had already provided for, it gradually grew out of use. 2 Bl. Com. 298, 299.—[Ed.]

(s) The following circumstances are necessary to make a good reservation.—1st. It must be by apt words. 2d. It must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of some thing issuing out of another thing. 3d. It must be of such a thing whereunto the grantor may have resort to distrain. 4th. It must be made to one of the grantors, and not to a stranger to the deed. Sheph. Touch. 80.—[Ed.]

often in process of time change; and the law was then holden, that a deed bearing date before the limited time of prescription, was not pleadable; and therefore they made their deeds without date, to the end they might allege them, within the time of prescription (τ). And the date of the deed was commonly added in the reign of E. 2. and E. 3. and so ever since.

And sometime antiquity added a place, as *Datum apud D.* which was in disadvantage of the feoffee; for being in general, he may allege the deed to be made where he will (υ). And lastly, antiquity did add *hiis testibus* in the continent of the deed after the *in rei cuius testimonium*, written with the same hand that the deed was, which witnesses were called, the deed read, and then their names entered. (t) And this is called charter-land; and accordingly the Saxons called it *bockland*, as it were bookland (25); which clause of *hiis testibus* in subject deeds continued until and in the reign of H. 8., but now is wholly omitted.

And the ancient charters of the king, which passed away any franchise or revenue of any estate of inheritance, had ever this clause of *hiis testibus*, of the greatest men of the kingdom, as the charters of creation of nobility yet have at this day. When *hiis testibus* was omitted, and when *teste me ipso* came into the king's grants, you shall read in the Second Part of the Institutes (26), *Magna Charta*, cap. 38. I have termed the said parts of the deed formal or orderly parts, for that they be not of the essence of a deed of feoffment; for if such a deed be without *premises, habendum, tenendum, red-dendum, clause of warranty*, the clause of *in cuius rei testimonium*, the *date*, and the clause of *hiis testibus*, yet the deed is good. (u) For if a man by deed give lands to another and to his heirs, without more saying, this is good, if he put his seal to the deed,

Clause of his
testibus.
(243)*

(t) Lamb. ex-
posit. verb.
terra ex
scripto. Vid.
Fortesc. ca.
32. See the
second part
of the Insti-
tutes, ca. 38.
12 E. 2. c. 2.
See the se-
cond part of
the Institutes.
Marib. cap. 6.
and cap. 14.

7 a.
(2 Inst. 77.)

Deed may be
good though
without the
formal parts;
(u) Mirror,
cap. 1. sect. 6.
and cap. 5.
sect. 1. Glan-
vill. lib. 10.
cap. 12. Bract.
lib. 5. fol. 396.
Fleta, lib. 6.
cap. 32. Brit-
ton, fol. 66.

(25) See further as to *bockland* and *folk-land*. Reliq. Spelm. 12. 39. and Dalrymp. Feud. Prop. 9. In this last book the very spirited writer attempts a new distinction between the two kinds of land, and to show that *bockland* or *thane land* was *feudal*, and that *folk* or *reveland* was *allodial*.—[Hargr. n. 6. 6 a. (26).]

(26) In the Second Institute, Sir Edward

Coke seems to think, that the clause of *teste me ipso* was first introduced into the king's grants in the time of Richard the Second; but Mr. Madox dates the use of it much earlier, and gives an instance in the reign of Richard the First. See 2 Inst. 77. and Mad. Form. Anglic. Dissert. p. 32.—Hargr. n. 2. 7 a. (32).]

(τ) That the date of a deed is not conclusive evidence of the time of execution, see *Lord Say and Sele's case*, 10 Mod. 40. *Hall v. Cazenove*, 4 East, 477; and that a deed may be dated or executed on a *Sunday* without prejudice, see *Drury v. Defontaine*, 1 Taunt. 131; for the statute 29 Car. 2. c. 7, for the better observance of the Lord's day, applies to process and proceedings of the courts, and dealings in the course of trade, and not to the private transactions of individuals, as between themselves by way of conveyance. 2 Prest. Conv. 362, 363.—[Ed.]

(υ) It is not absolutely necessary, that a deed should be dated; for if a deed has no date, or bears an impossible date, it will take effect from the time of its delivery. *Cromwell v. Grunden*, 2 Salk. 462. If two deeds bear the same date, and manifestly contain but one agreement, that deed shall be presumed to have been first executed, which will best support the clear intention of the parties. *Taylor v. Horde*, 1 Burr. 106.

With respect to the parties to a deed, see the last chapter; as to the description of the things granted, see ant. vol. 1. p. 199, et seq.; and as to the clause of exception, see post, 47 a. 143 a. and the notes there.—[Ed.]

or although the grantee be named in the habendum only.
(c) Vid. *Tearmes of the Law*, verb. *Falts*, vid. *Glanvil*, lib. 10. cap. 12. *Mirr.* ca. 1. sect. 3. and cap. 3. (2 Ro. Abr. 66. pl. 13. Cro. Eliz. 903.)

(244)*

Ancient deeds having an indorsement of the delivery, or of livery of seisin, suspicious.

21 H. 8. cap. 16.

deliver it, and make livery accordingly. (x) So it is if A. give lands to have and to hold to B. and his heirs, this is good, albeit the feoffee is not named in the (27) premises. And yet no well advised man will trust to such deeds, which the law by construction maketh *good, *ut res magis valeat*: but when form and substance concur, then is the deed fair and absolutely good.

In ancient charters of feoffment there was never mention made of the delivery of the deed, or any livery of seisin indorsed; for certainly the witnesses named in the deed were witnesses of both: and witnesses, either of delivery of the deed, or of livery of seisin, by express terms was but of later times, and the reason was in respect of the notoriety of the feoffment. And I have known some ancient deeds of feoffment, having livery of seisin indorsed, suspected, and after detected of forgery. As if a deed, in the style of the king, name him *defensor fidei* before 13 H. 8. or *supreme head* before 20 H. 8., at which time he was first acknowledged supreme head by the clergy, albeit the king used not the style of *supreme head* in his charters, &c. till 22 H. 8., or *king of Ireland* before 33 H. 8., at which time he assumed the title of *king of Ireland* (28), being before that called lord of Ireland, it is certainly forged; *et sic de similibus*.

7 b.

Livery of seisin incident to a feoffment. Vid. sect. 59.

Very necessary it is that witnesses should be under-written or indorsed, for the better strengthening of deeds, and their names (if they can write) written with their own hands. For Livery of Seisin, see hereafter, sect. 59., and for Deeds, sect. 66., and of Conditional Deeds, see our author in his Chapter of Conditions.

(245)*

365 a.
Definition of warranty.
Bract. lib. 2. fol. 37. Lib. 5. fol. 380. 381. &c. *Glanvil*. lib. 3. cap. 1. 2, 3. Lib. 7. cap. 2, 3. Lib. 9. cap. 4. *Bruton*, cap.

CHAP. XXXV.*

OF WARRANTY.

A WARRANTY is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same; and, either upon voucher, or by judgment in a writ of *warrantia cartæ*, to yield other lands and tenements (which in old books is called *in*

(27) The cases in 3 Leon. 33, and 2 Ro. Abr. 66. pl. 13, are *contra*. That in Cro. Eliz. 902 and 917. also seems *contra* on the first reading; though, on examination, the question appears to have been rather on the manner of pleading the deed, than on the operation of it. But in Car. Rep. 123, there is a case of the 21 and 22 Eliz. in which the two chief justices and the chief baron certi-

fied to the chancellor, that a lease was good in law, though the lessee was named in the *habendum* only; and the case in Allen, 41, is also with Lord Coke.—[Hargr. n. 3. 7 a. (33.)]

[Et vid. acc. Sheph. Touch. 75. *Spyve v. Topham*, 3 East, 115.]—[Ed.]

(28) See ante, vol. 1. p. 67. n. (14).]

excambio) to the value of those that shall be evicted by a former title, or else may be used by way of *rebutter* (1) (A).

105, fol. 249.
250, A.C. & fol.
83, 106 b. 194,
197. Fleta,
lib. 5. cap. 12.

Lib. 6. cap. 23. Mirr. cap. 2. sect. 17. 36 E. 3. 21. 45 E. 3. 18.

(1) See Mr. Butler's note at the end of the volume. Note V.

(A) Warranty was the obligation which the lord lay under, on receiving homage, to defend his tenant in the lands held of him; or, if he could not, to give him a recompense of equal value in other lands: our law went no further; but the feudal law, if the warrantor had no lands to give in exchange, obliged him to pay the value in money. Sulliv. Lect. xii. 119. Anciently, every kind of homage, when received, but not before, bound the lord to acquittal and warranty; that is, to keep the tenant free from distress, entry, or other molestation, for services due to the lords paramount, and to defend his title to the lands against all others; but in subsequent times, the implied acquittal and warranty were peculiar to that species of homage, which is called homage ancestral. Ant. vol. 1. p. 264. n. 18. Warranties are of two kinds, viz. *warranties in law*, either by homage ancestral, or by words in the deed, which the law construes to import warranty: and *warranties in deed*, which depend on a special contract. These last were substituted in the place of the former. For as by every alienation, either of the lord or tenant, the mutual connexion between the two bloods was extinguished, and warranty by homage ancestral consequently gone (ant. vol. 1. p. 377. n. 1.), the tenant would not attorn to his lord's grant when the lord aliened, nor a new tenant accept of a grant from an old tenant of his tenancy, without an express warranty, binding in the first case the new lord and his heirs; in the latter the old one and his heirs. Afterwards the making of these warranties was extended to persons between whom there was no feudal connexion; as if a man aliened lands to hold of his lord. Here the grantee held of the lord of the grantor, and not of the grantor; and therefore, as he had nothing to bind the lord to warranty, would insist on an express warranty from the grantor and his heirs. Sulliv. Lect. xii. 120, 121. Houard *Anciennes loix des François*, lib. 3. c. 13. Gilb. Ten. 133, 134, 154.

Express warranties are contracts which have all the import and effect of the feudal contract between the lord and tenant. For, 1st. they rebut such warrantor and his heirs from claiming any right in the land; and as in homage ancestral the rule was *homagium repellit perquintum*, so the express warranty repels the ancestor from claiming, and not only him, but the heir, though the right were not in the ancestor. And as in homage ancestral, where the heir received homage, he could never set up a title to the land itself; so here, in the express warranty, the heir is presumed to receive a recompense, and therefore is barred if he does not claim during the life of his ancestor; and this is the more reasonable, because such recompenses were anciently in lands, which did of right descend to the heir; and if the ancestor did alien them, the heir must claim his own during the life of his ancestor; otherwise he could never claim it, inasmuch as this was the whole time of limitation for the heir to challenge his own in this case. But though the warranty bars the right of entry or right of action in the heir, yet it does not bar a title of entry for a condition broken, or for mortmain, forfeiture, escheat, or the like. For the feudal contract only barred all the lord's right to the lands; but it did not bar his title of entry for condition broken, forfeitures, escheats, or the like. And the express warranty can go no further than the warranty implied in the feudal contract, since it came in the place of it.

The second operation of warranty is by way of voucher; for as in the feudal contract the tenant vouched the feudal lord to defend his possessions; so in the express warranty, the purchaser vouches his warrantor, who takes the defence of the estate upon him; and as no man could vouch the lord but the tenant, so no man can vouch the warrantor, but he who brings himself within the words of the contract: because there is no contract to defend the possession to any body else. But as the lord, by acceptance of homage from the disseisor, was barred from claiming the lands, so the warrantor, having received a recompense, is rebutted from claiming the land itself.

The third operation of warranty is by writ of *warrantia chartæ* (which also can only be brought by the party to such contract); for the tenant by homage ancestral might have had his *warrantia chartæ* against his lord, to subject the lands of his lord to answer the feudal contract. And when the assise was invented, in which a man could not vouch; and when also by Westm. 1. c. 40. a man could not vouch out of the degrees, unless in both cases the party was present, Booth, 278; then this writ came more into use; and upon such actions, where they could not vouch and have process *ad warrantizandum*, they requested a plea, and the same was done in the case of express warranty. But it is to be

(246)*
(Post, 308 b.
2 Rol. Abr.
776, 776. Cro.
Jac. 4.)

*247 a.
(a) Briu. fol.
187 b.

(b) Bract. lib.
5. fol. 380.

(c) Fleta, lib.
5. cap. 18.

102 a.

Diversity be-
tween the
common law
and the civil
law as to
warranty.
(Cro. Jam. 4.
1 Rol. Abr. 96.
F. N. B. 94.)

Rebouter is a French word, and is in Latin *repellere*, to repel or bar; that is, in the understanding of the common law, *the action of the heir by the warranty of his ancestor; and this is called to rebut or rebel. (a) Britton saith, *Garranter en un sence signifie a defender son tenant en sa seisin, et en auter sence signifie que si il ne defende, que le garrant luy soit tenue a eschanges, et de faire son gree a la vaillaunce.* (b) Bracton saith, *Warrantizare nihil aliud est, quàm defendere et acquietare tenentem qui warrantum vocavit in seisinâ suâ.* (c) Fleta saith, *Warrantizare nihil aliud est quàm possidentem vocantem defendere et acquietare in suâ seisinâ vel possessione erga petentem, &c. et tenens de re warranti excambium habebit ad valentiam.*

Note, that by the civil law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty (b); but the common law bindeth him not, unless there be a warranty, either in deed or in law; for *caveat emptor*.

observed, that, in case the warrantee is impleaded, he must request a plea; and when he has so done, he may bring his *warrantia chartæ*, and recover at any time till execution actually executed. But if he be turned out of possession, then he can have no *warrantia chartæ*; for the warranty in the feudal contract is to the tenant, and, in resemblance thereof, the express warranty is only to the tenant of the land. F. N. B. 135. B. n. c. Gilb. Ten. 134—139. 151—153.

The manner of taking advantage of this obligation of the lords by voucher, which still remains in our law, (the other method by disuse being antiquated) was shortly thus: When the tenant in possession is impleaded for the lands by a stranger, who claims them as his inheritance, he, the tenant, appears, defends his right, and *vouches*, that is, calls in his lord to warrant the lands to him. If the lord appears gratis, and enters into the warranty, as he ought, if he is bound to warranty, the tenant has no more to do in the defence of the suit. It is the lord's business. Against him the stranger declares and prosecutes the suit. He defends, and it is found against him, either by legal trial, or default for want of appearing; and the judgment the court gives is, that the demandant or stranger shall recover the lands demanded against the tenant, and that the tenant shall recover lands of equal value from the lord, or vouchee, as he is termed, because he is *vocatus*, or called in to take upon himself the defence. If the lord, who is to warrant, does not appear, he is summoned till he does; or if he appears, and will not enter gratis into the warranty, the tenant is to show how he is bound to warrant; which must be either by homage ancestral, or by his, or his ancestor's express covenant; and until this was determined, the suit of the demandant was suspended; because as yet it was uncertain who was obliged to defend the lands. So that in a judgment of this kind, there were in fact two judgments, one against the tenant, who was to give up the lands, and another against the lord, who was to give lands equal in value. But there might be three or more judgments, as there might be two or more vouchers; as if there be, in respect to land, A. B. and C.; A. lord paramount or superior, B. mesne, that is, tenant to A. and lord to C.; and C. tenant paravail, that is, the actual possessor of the land. Here, if D., a stranger, brings his action against C. the tenant, who vouches his lord B. the mesne, who enters into warranty, and vouches A. the lord paramount, who enters into warranty, and fails; D. will recover the land from C., C. will recover in value from B., and B. will recover in value from A.; and so on if there be more vouchers. Sulliv. Lect. xii. 120.

As to the distinction between lineal and collateral warranty, see post, 373 b. With respect to the doctrine of warranty at the civil law, see note (b), infra.—[Ed.]

(b) Warranty in the civil law, according to Domat, is the obligation of the seller to put a stop to the eviction and other troubles which the buyer suffers in his possession of the thing purchased. 1 Domat, b. 1. t. 2. s. 10. p. 79. Eviction is defined to be the loss which the buyer suffers, either of the whole thing that is sold, or of a part of it, owing to the right which a third person has to it. The other troubles, says the above writer, are those which, without touching the property of the thing sold, diminish the right of the purchaser; as if any one pretends a right to the umfruct of lands that are sold, to a ground rent, a service,

It is to be observed, that there be two kinds of warranties, *that is to say, *warrantia expressa et tacita*, vulgarly said warranty in deed, because they be expressed: and warranties in law, because the law doth tacitly imply them. And of warranties in law more shall be said hereafter in this chapter. As for promises or contracts annexed to chattels real or personal, they are not intended by our author, but only warranties concerning freeholds and inheritances.

Cro. Ja. 4. Ante, 101 b. Post, 384 a. 1 Rol. Rep. 316. Cro. Jac. 386.
Foph. 143. Bridg. 128. Owen, 60. 3 Mod. 261. S. C. Shower. 63.)

365 a.
The several kinds of warranty.
Lib. 4. fol. 81.
Noke's case.
(F. N. B. 134 b)
(248)*
Vid. sect. 733.
(2 Rol. Abr. 733. Sid. 178. 3 Bulst. 56.)

A warranty may not only be annexed to freeholds, or inheritances corporeal, which pass by livery; as houses and lands, but also to freeholds or inheritances incorporeal, which lie in grant, as advowsons, and to rents, commons, estovers, and the like, which issue out of lands or tenements. And not only to inheritances *in esse*, but also to rents, commons, estovers, &c. newly created (c).

366 a.
1. Warranty in deed. To what things it may be annexed.
(2 Rol. Abr. 744. Hob. 14. 2 Saund. 183.)

As a man (some say) may grant a rent, &c. out of land, for life, in tail, or in fee, with warranty: for although there can be no title precedent to the rent, yet there may be a title precedent to the land, out of which it issueth before the grant of the rent, which rent may be avoided by the recovery of the land; in which case the grantee may help himself by a *warrantia cartæ*, upon the especial matter. And so a warranty in law may extend to a rent, &c. newly created; and therefore if a rent newly created be granted in exchange for an acre of land, this exchange is good, and every exchange implieth a warranty in law. And so a rent newly created may be granted for owelty of partition.

2 H. 4. 13. 30
H. 8. Dyer 41.
Temps. E. 1.
Admeasurement 16. 32 E.
1. Voucher 294. 30 E. 1.
Exchange, 16.
9 E. 4. 15 E. 4.
9. 29. Ess. 13.
(F. N. B. 134.
Post, 50 b. 101
b. 308 nota.
Post, 389 a.)

*A man seised of a rent-seck issuing out of the manor of Dale, taketh a wife, the husband releaseth to the terre-tenant, and warranteth *tenementa prædicta*, and dieth, the wife bringeth a writ of dower of the rent, the terre-tenant shall vouch, for that albeit the

*366 b.
Vid. Sect. 741.
45 E. 3.
Voucher, 72.
9 E. 3. 78.
18 E. 3. 55. 30

or other charges of the like nature. The buyer, from whom the thing is thus evicted, or who is troubled in his possession, or in danger of being so, has his remedy against the seller, who ought to warrant him. The warranty is of two kinds; 1st. warranty *in law*, so called because the seller is bound to it by law, although the sale makes no mention thereof; 2dly. warranty *by deed*, or covenant, such as the seller and buyer are pleased to regulate among themselves. If the purchaser, who is molested, suffers himself to be condemned by default, or if he does not give notice to the seller of the action brought against him, or consents to a reference, or in any other manner prejudices the condition of his vouchee, he cannot demand warranty against an eviction, for which he has nobody to blame but himself. But the purchaser is only bound to give notice to the seller of the disturbance that is given him, and is not bound either to defend the action, or to appeal, if he is condemned. And whether he defends it or not, the seller will remain bound to warrant him against the event. And if the purchaser discovers that the seller has sold him that which belongs to another person, and which the seller knew to be such, he may bring his action against the seller, although he be not as yet disturbed in his possession, to oblige him to remove the danger of the eviction, and to recover the damages which he may suffer by such a sale. 1 Domat, b. 1. t. 2. s. 10. p. 78. 82.—[Ed.]

(c) An interest is said to be created *de novo* when it is granted, and the time of continuance marked by the same instrument. On the contrary, an interest is said to be already existing, *in case* when it is created, and the time of continuance granted at one time; and the same interest is granted, or transferred, for all the time, or some particular portion of it, at some future period. Prest. Est. 10.—[Ed.]

E. 3. 30. 21 H. 7. 9. 3 H. 7. 4. 7 H. 4. 17. 10 E. 4. 9 b. 21 E. 4. 26. 14 H. 8. 6. 30 H. 8. Dyer 42. (2 Rol. Ab. 744.)

(249)*

389 a.

(d. 21 E. 4. 18. 32. 1 H. 7. 12. 22. 11 H. 7. 16. 16. 20 H. 7. 2 b. 14 H. 7. 22. 43 E. 3. 26. per Finch. in Quar. Imp. 15 H. 7. 9. Lib. 10. f. 197. (Ante. 101. 388. Hob. 14. 28. 2 Saund. 180.)

(d) A warranty doth not extend to any lease, though it be for many thousand years, or to estates of tenant by statute staple, or merchant, or *elegit*, or any other chattel, but only to freehold or inheritances, as it appeareth in all Littleton's cases which he putteth in this chapter. And this is the reason, that in all actions which lessee for years may have, a warranty cannot be pleaded in bar, as in an action of trespass, or upon the statute of 5 R. 2., and the like. But in those actions when the freehold or inheritances do come in question, there the warranty may be pleaded: but in such actions which none but a tenant of the freehold can have, as upon the statute of 8 H. 6., assise, or the like, there a warranty may be pleaded in bår (d).

371 a.

On what conveyances it may be made. (3 Rep. 59. Post. 365 a. 388.)

*371 b.

(e) 14 E. 3. Voucher 408. 16 E. 3. Ibid. 67. 18 E. 3. Ibid. 6. 10 E. 3. 52. 21 E. 3. 27. 11 H. 4. 22. 44 E. 3. Cont. de Vouch. 22. 12 H. 7. 1. Vid. sect. 733. 738. 745. (Post. 365 a.)

LITTLETON. [Sect. 733.]

383 b.]

By what words created.

(350)*

(e) It is to be known, that upon every conveyance of lands, tenements, or hereditaments, as upon fines, feoffments, gifts, &c. releases and confirmations made to the *tenant of the land, a warranty may be made, albeit he that makes the release or confirmation, hath no right to the land, &c. but some do hold, that by release or confirmation where there is no estate created or transmutation of possession, a warranty cannot be made to the assignee (E).

*ALSO, where it is contained (1) in divers deeds these words in Latin. Ego et hæredes mei (2) warrantizabimus et in perpetuum defendemus; it is to be seen what effect this word (defendemus) hath in such deeds; and it seemeth that it hath not the effect of warranty, nor comprehendeth in it (3) *the cause of warranty; for if it should be so, that it took the effect or cause of warranty, then it should (4) be put into some fines levied in the king's court; and a man never saw (5) that this word (defendemus) was in any fine, but only this word (warrantizabimus); by which it seemeth, that this word (6) and verb (warrantizo (7)) maketh the warranty, and is the cause of warranty, and no other word in our law.*

(1) *move—mote*, L. and M. and Roh.

(2) *Ec.* added L. and M. and Roh.

(3) *la* not in L. and M. nor Roh.

(4) *mitte—mote*, L. and M. and Roh.

(5) *ceo*, not in L. and M. nor Roh.

(6) *et verbe*, not in L. and M. nor Roh.

(7) *as, Ec.* added L. and M.; *Ec.* only added in Roh.

(D) A warranty cannot be annexed to chattels real or personal, for if a man warrants them, the party shall have covenant, or an action upon the case. Post, 101 b. Also a warranty cannot be annexed to a copyhold estate; for it is only an estate at will, to which no warranty can be annexed of common right, nor is any estate less than a freehold capable of it. And a surrenderee of a copyhold comes in *en le post* by the lord, and not *en le per* by the party, Treat. of Ten. 163. See Vin. Abr. Copyhold (B. a.) pl. 2. A feoffee with warranty cannot take advantage of the same unless he is tenant of the land. 26 H. 8. 3 b. —[*Ed.*]

(E) But the law is otherwise; for if A. be seised of lands in fee, and B. release to him, or confirm his estate in fee with warranty to him, his heirs and assigns, this warranty is good; and both the party and his assignee shall vouch. Post, 385 a.—[*Ed.*]

Here Littleton draweth an argument from the form and words of a fine; and his reason is this: that seeing that a fine is the highest and surest kind of assurance in law, if *defendemus* had the force of a warranty, it would have been contained in fines; and, on the other side, seeing this word *warrantizo* is contained in fines to create a warranty, that therefore that word doth imply a warranty, and not the other (r). 384 a.

“*Ego et hæredes mei warrantizabimus, et in perpetuum defendemus.*” Wherein three things are to be observed. First, that *hæredes mei* are words of necessity, for otherwise the heirs are not bound (e). (f) Secondly, though in the clause of the warranty it be not mentioned to whom, &c. yet shall it* be intended to the feoffee. (g) Thirdly, that the feoffor may by express words warrant the land for the life of the feoffee, or of the feoffor, &c. but the recovery in value shall be in fee. (h) Of this Bracton writeth in this manner: *Et ego et hæredes mei warrantizabimus tali et hæredibus suis tantum, vel tali et hæredibus et assignatis et hæredibus assignatorum, vel assignatis assignatorum et eorum hæredibus, et acquietabimus et defendemus eis totam terram illam cum pertinentiis, contra omnes gentes, &c. Per hoc autem quod dicit (ego et hæredes mei) obligat se et hæredes ad warrantiam propinquos et remotos, præsentis et futuros, ei succedentes in infinitum. Per hoc autem quod dicit (warrantizabimus) suscipit in se obligationem ad defendendum suum tenentem in possessione rei datæ et assignatos suos et eorum hæredes, et omnes alios, &c. Per hoc autem quod (acquietabimus) obligat se et hæredes suos ad acquietandum si quis* plus petierit servitii vel aliud servitium quàm in cartâ donationis continetur. Per hoc autem quod dicit (defendemus) obligat se et hæredes suos ad defendendum si quis velit servitutem ponere rei datæ contra formam suæ donationis.* (i) Hereby it appeareth, that neither *defendere* nor *acquietare* doth create a warranty, but 383 b.

(f) 6 E. 2. Vouch. 238.
12 E. 2. Ibid.
282. 14 H. 4. 15.
(251)*
(g) 38 E. 3. 14.
(h) Bract. f. l. 37. 238. & lib. 5. 390. 391.
Britt. fol. 106 b. Fleta, lib. 5. cap. 15. & lib. 6. cap. 21.
55 H. 3. 8 Gar.
90. F. N. B. 134 b.

Britt. ubi supra. Fleta ubi supra.
41 H. 6. 48.
6 E. 2. Gar. 282.
*384 a.
(i) 46 E. 3. 23.
11 H. 4. 41.
6 E. 2. Vouch. 282. 2 E. 4. 76 a. (Moor 175.)

(r) The word *warrant*, when properly applied, has a particular sense; but it has in general a further sense; and therefore it is not necessary to understand *warranty* in a deed or covenant barely as a warranty of the title to the realty; but it shall be taken *secundum subiectam materiam*. Thus, in the case of *Williamson v. Codrington*, 1 Ves. 511. where a voluntary settlement was made in America, with a clause, whereby the settlor *obliged himself, his heirs, executors, and administrators, to warrant and for ever defend the plantation, negroes, cattle, stock, &c.*, the court observed, “Here are chattels to be warranted in this deed; some of which are certainly personal things, as cattle, horses, &c. though negroes in some instances are considered as annexed to the plantation. Then there are words binding his executors and administrators; which must be rejected, if to be construed as a mere real warranty of the land. This clause therefore is inconsistent with that narrow construction: nor is it penned as a real warranty, which is ‘I do for myself and my heirs warrant such land;’ here the words are, ‘I do oblige,’ &c. which amounts to the same as ‘I covenant,’ &c. for many other words in a deed will amount to a covenant, besides the word *covenant*; as ‘I oblige,’ agree. This then is barely a covenant for himself, his heirs, executors, and administrators, to warrant; which word must be construed in a larger sense than warranty in a strict legal sense, as large as *defend*. That construction a court of law or equity will put on it. *Per* Ld. Hardw. 1 Ves. 516.—[*Ed.*]

(e) If a man covenant for himself and his heirs with another and his heirs to warrant the land, this is a warranty to the heirs, and they shall vouch, notwithstanding that the word “heirs” does not immediately follow the word “warrant.” See *Doe, d. Hutchinson v. Preswidge*, 4 Maul. & S. 178. 182.—[*Ed.*]

warrantizare only. And as *Ego et hæredes mei warrantizabimus, &c.* in Latin do create a warranty : so, I and my heirs shall warrant, &c. in English doth create a warranty also (н).

(k) 2 E. 4. 15.
tit. Det. 71.
(2) Rol. Abr.
386. Cro. Car.
5. Dyer 255 a.
Ante, 201 b.
4 Rep. 80.
9 Rep. 61.)

(k) If a man be bound to A. in an obligation to defend such lands to A. whereof the obligor had infeoffed him for twelve years, &c. in this case if he be ousted by a stranger without being impleaded, the obligation is forfeit : but if he be bound to warrant the land, &c. the bond is not forfeited, unless the obligee be impleaded, and then the obligor must be ready to warrant, &c.

46 E. 3. 28.
Vid. sect. 1.

"And no other word in our law." Here it appeareth, that no other verb in our law doth make a warranty, but *warrantizo* only, which is only appropriated to create a warranty.

(252)*
Sect. 697.
(*) 31 E. 3.
Vouch. 24.
12 Rich. 2. tit.
Cont. de
Vouch. 35.
29 E. 3. 48.
30 E. 3. 6b.
Symken Si-
mon's case.
8 E. 3. 61.
12 E. 3.
Vouch. 27.
Tempe E. 1.
Vouch. 302.
3 H. 6. 17.
2. Warranty
in law.
Created by
the word
"give;"
secus as to
the word
"grant."
(b) L'etat. de
Bigamis, c. 6.
2 H. 7. 7.
6 H. 7. 2.
48 E. 3. 2.
31 E. 1. tit.
Vouch. 290.
Fitz. N. B.
134 b. 6 E. 2.
Vouch. 258.
(Vaugh. 118.)

*But *Qui benè distinguit benè docet* ; and here of necessity you must distinguish, (*) first, between a warranty annexed to a freehold or inheritance (whereof Littleton here speaketh), and a warranty annexed to a ward, which is a chattel real ; for there, grant, demise, and the like, do make a warranty. And of warranties annexed to freeholds and inheritances, some be warranties in deed, and some be warranties in law. A warranty in deed, or an express warranty (whereof Littleton here speaketh), is created only by this word (*warrantizo*) : but warranties in law are created by many other words ; they be therefore called warranties in law, because in judgment of law they amount to a warranty without this verb *warrantizo*. (l) As *dedi* is a warranty in law to the feoffee and his heirs during the life of the feoffor, but *concessi* in a feoffment or fine implieth no warranty (2) (1). But before the statute of *quia emptores terrarum*, if a man had given lands by the word *dedi*, to have and to hold to him and to his heirs, of the donor and his heirs, by certain services, then not only the donor but his heirs also had been bound to warranty ; but if before that statute a man had given lands by this word *dedi*, to a man and to his heirs for ever, to hold of the chief lord, there the feoffor had not been bound to warranty but during his life, as at this day he is.

(F. N. B.
134 b.)

And albeit the words of the statute of *bigamis* (κ) be, *in cartis*

(253)* *autem ubi continentur (dedi et concessi, &c.)*, yet if *dedi** be con-

(H) See Mad. Form. Angl. 77. p. 43. and for the forms of warranties, see the references under the word "warranty," in the Index of that book.—[Ed.]

(2) See Mr. Butler's note at the end of the volume. Note VI.

(1) It has been generally supposed, that the word *grant*, in any conveyance, will create a warranty, and therefore trustees are advised not to convey by that word. But it is now agreed, that the word "grant," when used in the conveyance of an estate of inheritance, does not imply a warranty, and that, if it did, the insertion of any express covenant, on the part of the grantor, would qualify and restrain its force and operation within the import and effect of that covenant ; as the law will not, when it appears by express words, how far the parties designed the warranty should extend, carry it further by construction. 4 Cru. Dig. 52.—[Ed.]

(K) The statute *De bigamis*, 4 Ed. 1. st. 3. c. 6. relates to the force and effect of certain words in a deed. It says, that deeds which contained the words *dedi et concessi tale tene-mentum*, without reserving homage, or without a clause containing warranty, and to be holden of the donors and their heirs by a certain service, should be so construed as that the

tained alone, it doth import a warranty : for the statute doth conclude, *ipse tamen feoffator in vitâ suâ ratione proprii doni sui tenetur warrantizare* ; so as *dedi* is the word that implieth warranty, and not *concessi*. Also where the words of the statute be further, *sine clausulâ quæ continet warrantiam*, the meaning of the statute is, that *dedi* doth import a warranty in law, albeit there be an express warranty in the deed.

For if a man make a feoffment by *dedi*, and in the deed doth warrant the land against J. S. and his heirs, yet *dedi* is a general warranty during the life of the feoffor : and so was the statute expounded in both points, (m) Hil. 14. El. in the court of common pleas, which I myself heard and observed. (n) And if a man make a lease for life, reserving a rent, and add an express warranty, here the express warranty doth not *take away the warranty in law, for he hath election to vouch by force of either of them. And in Noke's case note a diversity between a warranty that is a covenant real, and a

(m) Hil. 14
Eliz. in Com.
Banc.
(n) Lib. 4.
fol. 80. in
Noke's case,
8 E. 3. 69.
9 E. 3. 15.
10 E. 3. 11.
20 E. 3. Cont.
de Gar. 7.
(254)*
31 E. 3. Vouch.
230. 32 E. 3.
1b. 102. 43 E.

donors and their heirs should be bound to warranty : and in this respect, the statute seems to be only declaratory of the common law. 1 Reev. Hist. 445. 2 Inst. 275. But where a deed contained the words *dedi et concessi*, &c. to be holden of the chief lords of the fee, or of any other, and not of the feoffor, or his heirs, reserving no service, without homage, or without the above-mentioned clause, it was thereby declared, that the heirs should not be bound to warranty, notwithstanding the feoffor, during his life, should be bound by force of his own gift. 2 Reev. Hist. 144.

As the above statute confined the warranty created by the word *dedi* to the life of the feoffor, unless the lands were given to be held of him and his heirs ; it follows, that, since the stat. of *Quia emptores* (18 Ed. 1.) forbids such reservation of tenure, by ordaining that the feeoffee shall hold of the chief lord, the heirs of the feoffor cannot now, in any case where the fee is conveyed, be bound to warrantee by force of the word *give* ; but the warranty implied by that word is merely personal. Watk. Gilb. Ten. 401. 2 Bl. Com. 300.

It was otherwise however in the case of a gift in tail, or lease for life. For we have seen, that where a person seised in fee granted for life, or in tail, reserving the reversion to himself, the grantees of the particular estates held of the reversioner, and he of the chief lord : where a person granted for life or in tail, with a remainder over in fee-simple, both the tenants of the particular estates, and the remainder-men held of the chief lord. Ant. vol. 1. p. 299. n. (e). In the former case, therefore, as the tenure between the donor and the donees still subsisted, both the donor and his heirs, if the particular estates were created by the word *dedi*, were bound to warranty.

With respect to leases for years, a warranty we have seen cannot be annexed to them, because they are chattels real, supra, p. 249. n. (b) : but the words, "grant, demise," &c. are construed a covenant in favour of the tenant, enabling him to recover damages for the possession lost ; and the words, "yielding and paying," are held to amount to a covenant in favour of the landlord, enabling him to recover his rent by an action of covenant or debt, *Iggulden v. May*, 9 Ves. 330 ; and in this sense they are said to imply a warranty. But this warranty differs from the warranty annexed to freehold estates, both in its nature and in its operation ; in its nature, as it arises from contract, and not from tenure ; and in its operation, because, though the warranty which is a consequence of tenure cannot be modified by express warranties, yet this warranty may be regulated by any express covenants in the lease. Therefore if a man makes a lease for years by the words, "grant, demise," &c. and covenants that the lessee shall enjoy the land without any eviction from the lessor, or any claiming under him ; in this case the lessor shall not be bound to warrant the land, by the implied warranty, against an eviction by a stranger, for those words can be of no force, unless they are taken to explain how far the lessor shall be liable. *Noke's case*, 4 Co. 80. *Merrill v. Frame*, 4 Taunt. 329. But a distinction is observable between the operation of an express covenant in restraining the effect of an implied general covenant, and the operation of a particular covenant in restraining the effect of an express general covenant ; for the latter is not restrained by a subsequent covenant, unless it can be considered as part of the general covenant. Ibid. et vide 1 Saund. 60.—[Ed.]

3. 3. 2 E. 3.
th. Culin vka
17. 3 E. 3.
Formedon 44.

warranty concerning a chattel. (o) Also this word *excambium* doth imply a warranty.

Warranty in law implied by the word, "exchange;"

(o) 4 E. 2. Vouch. 245. 22 E. 3. 3. 14 H. 6. 2. 20 H. 6. 14. Lib. 4. fol. 122. in Bustard's case. 15 E. 3. Bar. 255. 43 E. 33. Lib. 1. fol. 96. Lib. 5. fol. 17. Spencer's case. Lib. 8. fol. 75. Sr. Stafford's case.

by a parti-
tion.
and by ho-
mage ances-
treil.

Also a partition implieth a warranty in law, as in the Chapter of Parceners appeareth. And homage ancestrel doth draw to itself warranty, as hath been said in the Chapter of Homage Ancestrel.

Diversity be-
tween these
words, as to
the extent of
the warranty
created by
them.

And it is to be observed, that the warranty wrought by this word *dedi*, is a special warranty, and extendeth to the heirs of the feoffee during the life of the donor only. But upon the exchange and homage ancestrel, the warranty extendeth reciprocally to the heirs, and against the heirs of both parties: and in none of the cases the assignee shall vouch by *force of any of these warranties, but in the case of the exchange and *dedi*, the assignee shall rebut, but not in the case of homage ancestrel (l).

*364 b.
(p) 28 Ass. 33.
14 H. 4. 5.
18 E. 3. 18.
4 E. 2. Avow.
201 & 202. 19
E. 3. Avow.
100. 30 H. 6. 7.
33 H. 8.
Dyer 51. 10
H. 7. 11 b.
F. N. B. 163 a.

Warranty in
law implied
on a gift in
tail, &c. re-
serving rent;
(q) 6 E. 2.
Cont. de
Vouch. 105.
5 E. 3. 67. 4
E. 2. Ibid. 102.
6 E. 3. 11. 50.
7 E. 3. 6. 18 E.
3. 8. 22 E. 3. 3.
3 H. 7. 13. 6
H. 7. 2. 14 E.
3. Garr. 32.
F. N. B. 134 g.
5 E. 3. 87. 20
E. 2. tit. Coun-
terpleas de
Gar. 7.

(255)*
or on an as-
signment of
dower.
(r) 4 E. 3. 36.
33 E. 3. tit.
Cont. de
Vouch. 122.
43 Ass. 32.
50 E. 3. 7. F.
N. B. 149 m.
Warranty in
law, with as-
sets, a good
bar.
(s) 14 H. 6. 2.
15 E. 3.
Bar. 255.

(p) And so no man shall have a writ of *contra formam collationis*, but only the feoffee and his heirs, which be privy to the deed; but an assignee may rebut by force of the deed.

(q) If a man make a gift in tail, or a lease for life of land, by deed or without deed (m), reserving a rent, or of a rent-service by deed, this is a warranty in law, and the donee or lessee, being impleaded, shall vouch and recover in value. And this warranty in law extendeth not only against the donor or lessor, and his heirs, but also against his assignees of the reversion; and so likewise the assignee of lessee for life, shall take benefit of this warranty in law.

(r) When dower is assigned there is a warranty in law included, that the tenant in dower, being impleaded, shall vouch and recover in value a third part of the two parts whereof she is dowable (1).

And it is to be understood, that a warranty in law and assets is in some cases a good bar. (s) In a formedon in the descender the tenant may plead, that the ancestor of the demandant exchanged the land with the tenant for other lands taken in exchange, which descended to the demandant, whereunto he hath entered and agreed; or if he hath not entered and agreed unto the lands taken in exchange then the tenant may plead the warranty in law, and other assets descended.

(t) 36 E. 3. 22.
24, 24. 13 E. 3.
Gar. 36.

(t) If tenant in tail of lands make a gift in tail, or a lease for life, rendering a rent, and dieth, and the issue bringeth a formedon in the

(l) The assignee of tenant by homage ancestrel shall neither vouch nor rebut the lord, for the advantage given to the tenant in respect of the long continuance of the tenure, cannot be transferred to a stranger. Hawk. Abr. 490.—[Ed.]

(m) That is, at common law, before the stat. 29 Cha. 2. c. 3.—[Ed.]

(1) Tenant by the curtesy cannot vouch, because he shall not recover in value, 10 H. 7. c. 10. b. but he may pray in aid of him in the reversion. Hob. 21.—[Butler. Note, 333.]

descender, the reversion and rent shall not bar the demandant; because by his formedon he is to defeat the reversion and rent. *Et non potest adduci exceptio ejusdem rei, cujus petitur dissolutio.*

(u) But if other assets in fee-simple do descend, then this warranty in law and assets is a good bar in the formedon.

(u) 16 E. 3.
Age 45. 18 E.
3. 8. 31 E. 3.
Gar. 29.

Here four things are to be observed: First, that no warranty in law doth bar any collateral title, but is in nature of a lineal warranty: wherein the equity of the law is to be observed.

Secus as to
collateral
titles.

Secondly, that an express warranty shall never bind the heirs of him that maketh the warranty, unless (as hath been said) they be named: as for example, Littleton here saith (*Ego et hæredes mei*); but in case of warranties in law, in many cases the heirs shall be bound to warranty, albeit they be not named.

(1 Rep. 10.)

Warranty in
law binds the
heirs though
not named;

Thirdly, that in some cases warranties at law do extend to execution in value, of special lands, and not generally of *lands descended in fee-simple (o), as you may see at large in my Reports.

and extends
in some cases
to special
lands;
Vid. Lib. 4.
fol. 121. Bus-
tard's case.
(256)*

(w) Fourthly, that warranties in law may be in some cases created without deed, as upon gifts in tail, leases for life, exchanges, and the like.

and may be
created with-
out deed.
(w) 45 E. 3.
20 b.

If a man of full age and an infant make a feoffment in fee with warranty, this warranty is not void in part, and good in part; but it is good for the whole against the man of full age, and void against the infant: for albeit the feoffment of an infant passing by livery of seisin be voidable, yet his warranty, which taketh effect only by deed, is merely void.

367 b.
3. Circum-
stances requi-
site to a good
warranty in
deed.
Must be
made by a
person of full
age.

Also an express warranty cannot be created without deed, and a will in writing is no deed, and therefore an express warranty cannot be created by will (p).

Temp. E. 1
Vouch. 207.
39 E. 3. 26.
John Lon-
don's case, 14
H. 6. (8 Rep.
42 Plowd. 66
b. 5 Rep. 119.)

386 a.
And by deed.

A man letteth lands for life upon condition to have fee, and warranteth the lands *in forma prædictâ*, afterward the lessee performeth the condition whereby the lessee hath fee, the warranty shall extend and increase according to the state. And so it is in that case if the lessor had died before the performance of the condition, the warranty shall rise and increase according to the estate, and yet the lessor himself was never bound to the warranty, but it hath re-

378 a.
And on an
estate of
freehold.
(8 Rep. 73.)
(Hob. 120,
131.)

(o) As in case of exchange and partition.—[*Ed.*]

(p) Another requisite to a good warranty is, that there be some estate to which the warranty is annexed that may support it; for if one covenant to warrant land to another, and make him no estate, or make him an estate that is not good, and covenant to warrant the thing granted; in these cases the warranty is void. 10 C. 96. So, if the estate to which the warranty was annexed is determined, the warranty dependent on it is likewise determined. Thus if a man makes a gift in tail, and warrants the land to the donee and his heirs, and afterwards tenant in tail makes a feoffment and dies without issue, the feoffee shall not rebut the donor in a *formedon in reverter*, because the estate to which the warranty was annexed is determined. *Ibid.*—[*Ed.*]

lation from the first livery. And by this it appeareth that a warranty, being a covenant real executory, may extend to an estate *in futuro*, having an estate, whereupon it may work in the beginning. But if a man grant a seignory for years, upon condition to have fee *with a warranty *in formā prædictā*, and after the condition is performed, this shall not extend to the fee, because the first estate was but for years, which was not capable of a warranty. And so it is, if a man make a lease for years, the remainder in fee, and warrant the land *in formā prædictā*, he in the remainder cannot take benefit of the warranty, because he is not party to the deed; and immediately he cannot take, if he were party to the deed, because he is named after the *habendum*, and the estate for years is not capable of a warranty (q). And so it is, if land be given to A. and B. so long as they jointly together live, the remainder to the right heirs of him that dieth first, and warrant the land *in formā prædictā*; A. dieth, his heir shall have the warranty; and yet the remainder vested not during the life of A, for the death of A. must precede the remainder, and yet shall the heir of A. have the land by descent.

*378 b.

(1 Rep. 17.)

376 a.

Descends to the heir at common law. Vid. sect. 3. 618. 736, 736, 737. (Post 329 a. Cro. Eliz. 72.)

It is a maxim of the common law, that every warranty doth descend upon him that is heir to him that made the warranty, by the common law, as by the example in sect. 718 it appeareth.

LITTLETON.
[Sect. 735.
386 a.]

*ALSO, a warranty cannot go (8) according to the nature of the tenements by the custom, &c. but only according to the form of the common law. For if the tenant in tail be seised of tenements in borough English, where the custom is, that all the tenements within the same borough ought to descend to the youngest son, and he discontinueth the tail with warranty, &c. and hath issue two sons, and dieth seised of other lands or tenements in the same borough in fee-simple to the value or more of the lands intailed, &c. yet the youngest son shall have a formedon of the lands (9) tailed, and shall not be barred by the warranty of his father, albeit assets descended to him in fee-simple from his said father *according to the custom, &c. because the warranty descendeth upon his elder brother who is in full life (10), and not upon his youngest. (11) And in the same manner it is of collateral warranty (R) made of such tenements, where the warranty descendeth upon the eldest son, &c. this shall not bar the youngest son.*

*386 b.

(358)*

LITTLETON.
[Sect. 736.
386 b.]
(3 Rep. 86.)

IN the same manner it is of lands in the county of Kent, that are called gavelkind, which lands are dividable between the

(8) *solonque-sans*, L. and M. and Roh.(10) *&c.* added in L. and M. and Roh.(9) *terres-tenemens*, L. and M. and Roh.(11) *Et* not in L. and M. nor Roh.

(q) And therefore the lease for years not being capable of a warranty, he cannot take benefit of it by way of remainder. See *Spencer's case*, 5 Co. 17.—[Ed.]

(R) *Collateral warranty* is where the person on whom the warranty descends, does not derive his title from the warranting ancestor: *lineal warranty* is where the heir to the warranty would have conveyed his descent to the lands (if there had been no warranty) from the same ancestor, who made the warranty. See further, as to the distinction between lineal and collateral warranty, post, 370 a.—[Ed.]

brothers, &c. according to the custom (12); if any such warranty be made by his ancestor, such warranty shall descend only to the heir which is heir at the common law (13), that is to say, to the elder brother, according to the consusage of the common law, and not to all the heirs that are heirs of such tenements according to the custom (14).

Hereupon a diversity is to be observed between the lien real, and the lien personal; for the lien real, as the warranty, doth ever descend to the heir at the common law; (x) but the lien personal doth bind the special heirs, as all the heirs in gavelking, and the heir on the part of the mother, as hath been said.

386 b.
Diversity
herein be-
tween a lien
real, and a
personal
lien.
Vid. sect. 603.
718. & 737.
(2 Rep. 25.)
(s) 11 E. 3.
Det. 7. 11 H.
7. 12.

*ALSO, if tenant in tail hath issue two daughters by divers venters, and dieth, and the daughters enter, and a stranger disseiseth them of the same tenements, and one of them (15) releaseth by her deed to the disseisor all her right, and bind her and her heirs to warranty, and die without issue; in this case the *sister which surviveth may well enter, and oust the disseisor of all the tenements, because such warranty is no discontinuance nor collateral warranty to the sister that surviveth, for that they are of half blood, and the one cannot be heir to the other, according to the course of the common law. But otherwise it is, where there be daughters of tenant in tail by one venter.*

LITTLETON.
[Sect. 737.
386 b.]

*387 a.

The reason of this is in respect of the half blood, whereof sufficient hath been said in the first book, in the Chapter of Fee-simple.

*Two brothers be by demy venters; the eldest releaseth with warranty to the disseisor of the uncle, and dieth without issue, the uncle dieth, the warranty is removed, and the younger brother may enter into the lands (s).

(259)*
(Ante, 12 a.
14 a.)

Where the right is *in esse* in any of the ancestors of the heir, at the time of the descent *of the collateral warranty, there, albeit the warranty descend first, and after the right doth descend, the collateral warranty shall bind, as in the case of our author (sect. 741) expressly appeareth. But where the right is not *in esse* in the heir, or any of his ancestors, at the time of the fall of the warranty, there

388 a.
*388 b.

The estate
must be turn-
ed to a right
in the heir,

(12) &c. added in L. and M. and Roh.

(14) &c. added L. and M. and Roh.

(13) *c'estasavoir al eigne frere, selonque la consusage del common ley*, not in L. and M. nor Roh.

(15) *eux—les filles*, L. and M. and Roh.

(s) Another requisite to a good warranty is, that he that is heir do continue to be so, and that neither the descent of the title, nor the warranty be interrupted: for if one binds him and his heirs to warranty, and after is attainted of treason or felony, (not within the statute 54 Geo. 3. c. 145.) and dies, this warranty does not bind his heir. Post, sect. 745. So if tenant in tail be disseised, and after release to the disseisor with warranty, and after the tenant in tail be attainted of felony, and have issue, and die, this warranty will not bind the issue. Post, sect. 746. And the reason is, because there is nothing in this case to make a discontinuance, but the warranty, which cannot descend to the issue in tail, because the blood between the issue in tail and him that made the warranty is corrupt. Ibid.—[Ed.]

or his ancestor, at the fall of the warranty.
(10 Rep. 95.)
(y) 7 E. 3. 46.
(30 H. 8. 42.)
(10 Rep. 95.)

it shall not bind. (y) As if lord and tenant be, and the tenant make a feoffment in fee with warranty, and after the feoffor purchase the seignory, and after the tenant cesse, the lord shall have a *cessavit*; for a warranty doth extend to rights precedent, and never to any right that commenceth after the warranty: whereof more shall be said in this section. Also, a warranty shall never bar any estate that is in possession, reversion, or remainder, that is not divested, displaced, or turned to a right before, or at the time of the fall of the warranty.

(z) Lib. 1.
fol. 67. Archer's case.

(z) If a lease for life be made to the father, the remainder to his next heir, the father is disseised, and releaseth with warranty, and dieth; this shall bar the heir (τ), although the warranty doth fall and the remainder cometh *in esse* at one time.

(a) Temps
E. 1. Vouch.
256. 31 Ass.
13. 22 Ass.
36. 41 Ass. 6.
23 E. 3. 14.
Gar. 74. Lib.
10. fol. 97.
E. Seymour's
case.
(9 Rep. 108.)
(260)*

(a) If there be father and son, and the son hath a rent-service, suit to a man, rent-charge, rent-seck, common of pasture, or other profit *apprender* out of the land of the father, *and the father maketh a feoffment in fee with warranty, and dieth, this shall not bar the son of the rent, common, or other profit *apprender* (υ), *quamvis clausula specialis warrantie vel acquietantie in cartis tenentium inseratur, quia in tali casu transit terra cum onere*: and he that is in seisin or possession need not to make any entry or claim: and albeit the son, after the feoffment with warranty, and before the death of the father, had been disseised, and so being out of possession, the warranty descended upon him, yet the warranty should not bind him, because at the time of the warranty made, the son was in possession (w). (*) So if my collateral ancestor release to my tenant for life, this shall not bind my reversion or remainder, because that the reversion or remainder continued in me. But if he that hath a rent, common, or any profit out of the land in tail, disseise the tenant of the land, and maketh a feoffment of the land, and warrant the land to the feoffee and his heirs; (b) regularly the warranty doth extend to all things issuing out of the land, that is to say, to warrant the land in such plight and manner, as it was in the hand of the feoffor, at the time of the feoffment with warranty; and the feoffee shall vouch, as of lands discharged of the rent, &c. at the time of the feoffment made.

(*) 45 E. 3. 31.
21 H. 7. 11.
Vid. sect. 698.

(b) 21 E. 4. 26.
21 H. 7. 9.
3 H. 7. 4. 17.
30 H. 8. Dyer,
42. 30 E. 3.
30. 9 E. 3. 78.
45 E. 3.
Vouch. 72.
F. N. B. 125.
14 H. 8. (6
Ante, 308 b.
Moore. 56.)

A woman that hath a rent charge in fee intermarrieth with the tenant of the land, an estranger releaseth to the tenant of the land with warranty; he shall not take advantage of this warranty either by voucher or *warrantia cartæ*; for the wife, if her husband die, or the heir of the wife, living the husband, cannot have an action

(τ) That is, at common law, before the statute 4 and 5 Ann. c. 16. See the note to fo. 373 b. *infra*.—[Ed.]

(υ) And the reason is, because the son was actually seised of the rent or common at the time of the warranty, and he who is in possession needs not put in his claim, either to avoid the fine or collateral warranty. *Seymour's case*, 10 Co. 96. Et vid. acc. *Goodright d. Hare*, v. *Board*, 1 Cru. 249. 3 T. R. 162. 1 Prest. Conv. 230, 231.—[Ed.]

(w) And the warranty, at the time of the creation of it, did not extend to any estate of freehold or inheritance *in esse*. 10 Co. 96.—[Ed.]

for the rent upon a title before *the warranty made; for if the heir of the wife bring an assise of *mort d'ancestor*, this action is grounded after the warranty, whereunto, as hath been said, the warranty shall not extend (x). *389 a.

So it is, if the grantee of the rent grant it to the tenant of the land upon condition, which maketh a feoffment of the land with warranty, this warranty cannot extend to the rent, albeit the feoffment was made of the land discharged of the rent; for, if the condition be broken, and the grantor be entitled to an action, this must of necessity be grounded after the warranty made. (261)
(Ante, 366 b.)
(Ante, 202.)

But in the case aforesaid, when the woman grantee of the rent marrieth with the tenant, and the tenant maketh a feoffment in fee with warranty, and dieth, in a *cui in vita* brought by the wife (as by law she may), (c) the feoffee shall vouch as of lands discharged at the time of the warranty made, for that her title is paramount: so, if tenant in tail of a rent-charge purchase the land, and make a feoffment with warranty, if the issue bring a *formedon* of the rent, the tenant shall vouch *causâ quâ suprad* (y). (c) 7 H. 4. 17.

(*) But some do hold, that a man shall not vouch, &c. as of land discharged of a rent-service. (*) 10 E. 4. 9 b.
18 E. 3. 55.
44 E. 3. 19.

(d) Also, no warranty doth extend unto mere and naked titles, as by force of a condition with clause of re-entry, exchange, mortmain, consent to the ravisher, and the like, because that for these no action doth lie; and if no action can be brought, there can be neither voucher, writ of *warrantia cartæ*, nor rebutter, and they continue in such plight and essence as they were by their original creation, and by no act can be displaced or divested out of their original essence, and therefore cannot be bound by any warranty (z). (d) Lib. 10.
fol. 97. E.
Seymour's
case. 22 Ass.
pl. 38. 31 Ass.
pl. 13. 41 Ass.
pl. 6. 33 E. 3.
Gar. 74. (2
Cro. 593.
Dyer, 234 a.
3 Inst. 216.
10 Rep. 95 b.
Post, 265 a.
Flowd. 363 b.)

(e) And albeit a woman may have a writ of dower to recover her dower, yet because her title of dower cannot be *divested out of the original essence, a collateral warranty of the ancestor of the woman shall not bar her. So it is of a feoffment *causâ matrimonii prælocuti*. (e) 34 E. 3.
tit. Droit. 72.
21 E. 4. 92.
(262)*
(4 Rep. Ver-
non's case.)

(x) The grantee in this case could not have advantage of the warranty, as to the rent, because the wife's estate therein was not displaced when the warranty was made; and if the wife or her heir afterwards bring an action for the rent, it must be grounded on some act done after the warranty was made. Hawk. Abr. 496.—[Ed.]

(y) In both these cases the feoffee shall vouch as of lands discharged of the rent, for the warranty extends to all things issuing out of the lands, and secures it in such plight, as it was in the feoffor at the time of the feoffment made; but inasmuch as the rent is a thing that lies not in discontinuance, the issue or wife may distrain for it, and avoid the warranty; for it is in their election whether they will look on themselves as in possession or not. Seymour's case, 10 Co. 96.—[Ed.]

(z) And for the same reason, a rent-charge, or other collateral interest, or easement, cannot be barred by non-claim on a fine. *Carhampton v. Carhampton*, 1 Irish T. Rep. 567. 5 Co. 124 a. Sheph. Touch. 22. Nor can an *interesse termini* while it remains such; that is, till it gives a right of entry; nor a condition, till it operates by giving a right of entry: nor a power, or rather an authority given to executors to sell, be barred by non-claim on a fine, since in all these instances there is no adverse possession. 2 Prest. Conv. 231.—[Ed.]

LITTLETON.
[Sect. 734.
385 b.]

Must take
effect in the
life of the
ancestor, and
be binding on
him.

*386 a.

*ALSO. if tenant in tail be seised of (16) lands devisable by testament after the custom, &c. and the tenant in tail alieneth the same (17) tenements to his brother in fee, and hath issue, and dieth, and after his brother deviseth by his testament the same tenements to another in fee, and bindeth him and his heirs to warranty, &c. and dieth without issue; it seemeth that this warranty shall not bar the issue in the tail, if he will sue his writ of formedon, because that this warranty shall not descend to the issue in tail, insomuch as the uncle of the issue was not bound to the same warranty in his life-time: neither (18) could he warrant the tenements in his life, insomuch as the devise could not take any execution or effect until after his decease. (1) And insomuch as the uncle in his life was not *held to warranty, such warranty may not descend from him to the issue in the tail, &c. for nothing can descend from the ancestor to his heir, unless the same were in the ancestor (2).*

(6 Rep. 33.
2 Cro. 570.
10 Rep. 95.)

(f) 31 E. 1.
Grant 86.
(Hob. 130.
Ante, 213 b.)

Bract. lib. 2.
fol. 37. 238.
Britu. fol.
106 b.

(g) Fleta, l. 2.
c. 55. Britu.
fol. 65 b.
11 H. 6. 48.
(4 Rep. 80.
Ante, 203 a.)
(263)*

Here our author declareth one of the maxims of the common law, that the heir shall never be bound to any express warranty, but where the ancestor was bound by the same warranty; for, if the ancestor were not bound, it cannot descend upon the heir, which is the reason here yielded by Littleton. (f) If a man make a feoffment in fee, and bind his heirs to warranty, this is void, by the warrant of this maxim, as to the heir, because the ancestor himself was not bound. Also, if a man bind his heirs to pay a sum of money, this is void. And of the other side, if a man bind himself to warranty, and bind not his heirs, they be not bound; for he must say, as it appeareth before, *Ego et hæredes mei warrantizabimus*, &c. (n). (g) And Fleta saith, *Nota quòd hæres non tenetur in Angliâ ad debita antecessoris reddenda, *nisi per antecessorem ad hoc fuerit obligatus, præterquam debita regis tantum; A fortiori* in case of warranty, which is in the realty.

Secus as to a
warranty in
law.

(h) 18 E. 3. 8.

But a warranty in law may bind the heir, although it never bound the ancestor, and may be created by a last will and testament. (h) As if a man devise lands to a man for life or in tail reserving a rent, the devisee for life or in tail shall take advantage of this warranty in law, albeit the ancestor was not bounden, and shall bind his heirs also to warranty, although they be not named. Also, an express warranty cannot be created without deed, and a will in writing no deed, and therefore an express warranty cannot be created by will.

(16) *terres—tenements*, L. and M. and Roh.

(17) *mesmes*, not in L. and M. nor Roh.

(18) *que il ne*, not in L. and M. nor Roh.

(1) Upon a similar principle it was held that a person could not devise land in frank-marriage, because the donee could not hold of the donor. Ant. 21 b. vol. 1. p. 524. [Butler, Note 336.]

(2) It is a general rule that the heir cannot take any thing by descent, where the ancestor is secluded from taking. Ante, 99 b. If a father and his heir apparent join in a warranty, the heir is doubly bound, by his own warranty, and as heir to his father. Moore, 20. [Butler, Note 337.]

(n) Vide Heba, lib. 2. cap. 62. § 10.

And it is also to be observed, that in all the cases that Littleton hath put, or shall put, the lineal or collateral warranty doth bind the heir; and therefore the successor claiming in an other right shall not be bound by the warranty of any natural ancestor. For which cause, (i) in a *juris utrum* brought by a parson of a church, the collateral warranty of his ancestor is no bar, for that he demandeth the land in the right of his church in his politic capacity, and the warranty descendeth on him in his natural capacity. (k) But some have holden, that if a parson bring an assise, that a collateral warranty of his ancestor shall bind him; and their reason is, for *that the assise is brought of his possession and seisin, and he shall recover the mean profits to his own use: but seeing he is seised of the freehold, whereof the assise is brought, *in jure ecclesiæ*, which is in another right than the warranty, it seemeth that it should not be any bar in the assise. The like law is of a bishop, archdeacon, dean, master of an hospital, and the like, of their sole possessions, and of the prebend, vicar, and the like.

(*) King H. 3. gave a manor to Edmund earl of Cornwall, and to the heirs of his body, saving the possibility of reverter, and died: the earl, before the statute of W. 2. cap. 1. *de donis conditionalibus*, by deed gave the said manor to another in fee with warranty in exchange for another manor, and after the said statute in the twenty-eighth year of E. 1. dieth without issue, leaving assets in fee-simple; which warranty and assets descended upon king E. 1. as cousin german *and heir of the said earl, viz. son and heir of king Henry 3., brother of Richard earl of Cornwall, father of the said earl Edmund. And it was adjudged, that the king, as heir to the said earl Edmund, was by the said warranty and assets barred of the possibility of reverter, which he had expectant upon the said gift, albeit the warranty and assets descended upon the natural body of king E. 1., as heir to a subject; and king E. 1. claimed the said manor, as in his reverter *in jure coronæ* in the capacity of his body politic, in which right he was seised before the gift. In this case, how by the death of the said earl Edmund without issue, the king's title by reverter, and the warranty and assets came together, and that the warranty was collateral, yet the king shall not be barred without assets, as a subject shall be; and many other things are to be observed in this case, which the learned reader will observe (1).

Here not this diversity: if the heir be within age at the time of the descent of the warranty, he may enter and avoid the estate, either within age, or at any time after his full age (p 1); and Little-

(1) The king was barred of the possibility of reverter descending to him *in jure coronæ*, by warranty and assets from a subject descending on his body natural, because in all likelihood those lands will descend to the same person to whom the crown will descend, and consequently will be a good recompense for the loss of the crown lands; but in the case of the parson his successor can have no benefit of what the predecessor has in his natural capacity. Hawk. Abr. 474.—[Butler, Note 321.]

(p 1) The last requisite to a good warranty, is, that the heir, who is to be barred by the warranty, be of full age at the time of the fall of the warranty; for if the ancestor make a feoffment, or a release with warranty, his heir being within age, and after the ancestor

370 a.
The heir must claim in the same right.

(j) 27 H. 6. Garr. 48.

(k) 34 E. 3. Garr. 71.

*370 b.

Diversity in the case of a warranty with assets descending on the king. (*) 45 Ass. 6. 6 E. 3. 56 a. b. Pl. Com. 294. & 553, 554. (8 Rep. 1. Ant. 19 b.)

(264)*

Vid. 27 H. 6. Garr. 48. 34 E. 3. Garr. 71.

Vid. Sect. 711, 712. (Hob. 338. 9 Rep. 132 b. Vaugh. 379.)

380 a.

The heir must be of full age at the fall

of the warranty:
18 E. 4. 13. 35
H. 6. 63. 28
Ass. 28. 32 E.
3. Garr. 30.
(1 Rep. 120.
140.) (2 Rol.
Abr. 773.)
35 H. 6. 63.
(265)*

(2) 3 H. 7. 9.
35 H. 6. 63.
Br. tit. War.
54. 38 H. 8. tit.
War. Br. 84.
Libl. 1. fol. 67 a.
In Archer's
case, & 140.
Chudley's
case.

*380 b.
unless his en-
try was taken
away.
(1 Rep. 66.)
(m) 18 E. 3. 2.
(F. N. B. 192 g.
2 Inst. 453.)

ton (sect. 726.) saith well, that the infant in this case may enter upon the alienee; for if he bring his action against him, he shall be barred by this warranty, so long as the state whereunto the warranty is annexed continue, and be not defeated by entry of the heir; but if he be within age at the time of the alienation with warranty, and become of full age before the descent of the warranty, the warranty shall bar him *for ever. Our author putteth his cases where the entry of the issue is lawful; (*l*) for where the entry of the infant is not lawful when the warranty *descendeth, the warranty doth bind the infant, as well as a man of full age; and the reason thereof is, because the state, whereunto the warranty was annexed, continueth and cannot be avoided but by action, in which action the warranty is a bar; and for the same reason likewise it is of a feme covert, if her entry be not lawful, a warranty, descending on her during the coverture, doth bind her. (*m*) And, albeit the husband be within age at the descent of the warranty, yet, if the entry of the wife be taken away, the warranty shall bind the wife.

If lands had been given to the husband and wife and their heirs, and the husband had made a feoffment to another, to whom a collateral ancestor of the wife had released, and died, and the husband died, (and this had been before the statute of 32 H. 8.) this warranty had so bound her waivable right, as she could not waive her estate, and claim dower. Otherwise it is of an estate determined: for if a disseisor make a lease to the husband and wife during the life of the husband, and the husband dieth, she may disagree to this estate determined, to save herself from damages. And so note a diversity between an estate determined, and an estate bound by warranty.

LITTLETON.
[Sect. 697.
364 b.]
4. Effect of
warranty.
At common
law every
warranty
(except by
disseisin)
was a bar to
the heir.

IT is commonly said, that there be three warranties, scil. warranty lineal, warranty collateral, and warranty that commences by disseisin. And it is to be understood, that before the statute of Gloucester all warranties which descended to them which are heirs to those who made the warranties, were bars to the same heirs to demand any lands or tenements against the warranties, except the warranties which commence by disseisin; for such warranty was no bar to the heir, for that the warranty commenced by wrong, viz. by disseisin.

365 a. Here our author beginneth with an exact division of warranties.

And this division of warranties that Littleton here speaketh of, he intendeth of warranties in deed.

die, and the warranty descend upon the heir within age, this is no bar. *Chudleigh's case*, 1 Co. 140 b. So if an infant was disseised, and the ancestor of the infant released to such disseisor with warranty, and died during the non-age of the heir, this was no bar; for the heir having in himself the right of possession, might enter; and consequently by his entry the estate to which the warranty was annexed was defeated, the warranty not interfering with his *right of entry*. But if he had only had a *right of action*, he would have been bound; as the warranty would have been an utter bar to any action brought, though it would not preclude him from entering. *Infra*, 380 a. Watk. Gilb. Ten. 148. 404.—[Ed.]

*“*Before the statute of Gloucester.*” This statute was made (266)*
at a parliament holden at Gloucester in the sixth year of the reign
of king E. 1., and therefore it is called the statute of Gloucester.

Alteration in
the common
law by the
stat. of Glouc.
cap. 3. re-
inheriting.
(2 Inst. 293.)

straining alienation with warranty tenants by curtesy, &c. of their wives' inheritances.
Glouc. cap. 3. Vid. sect. 734, 726. & 727. &c.

By the statute of Gloucester four things are enacted :

Construction
of this statute.
(8 Rep. 52, 53.)

First, that if a tenant by the curtesy alien with warranty and dieth, that this shall be no bar to the heir in a writ of *mort d'ancestor*, without assets in fee-simple; and if lands or tenements descend to the heir from the father, he shall be barred, having regard to the value thereof.

*Secondly, that if the heir, for want of assets at that time descended, doth recover the lands of his mother by force of this act, and afterwards assets descend to the heir from the father, then the tenant shall recover against the heir the inheritance of the mother by a writ of false judgment, which shall issue out of the record, to re-summon him that ought to warrant, as it hath been done in other cases, where the heir being vouched cometh into the court, and pleadeth that he hath nothing by descent. *365 b.

Thirdly, that the issue of the son shall recover by a writ of *cosinage*, *aiel*, and *besaiel*.

And lastly, that the heir of the wife, after the death of the father and mother, shall not be barred of his action to demand the heritage of the mother by writ of entry, which his father aliened in the time of his mother, whereof no fine was levied in the king's court.

Concerning the first, there be two points in law to be observed: (Post, 54 b.)

First, albeit the statute in this article name a writ of *mort d'ancestor*, and after writs of *cosinage*, *aiel* and *besaiel* (n); yet a writ of right, a formedon, a writ of entry *ad communem legem*, and all other like actions, are within the purview of this statute; for those actions are put but for examples.

(n) 11 E. 2. ubi
Garr. 83. 4 E.
2. Garr. 63. 18
E. 3. 51. Pl.
Com. 110. 7
E. 3. 53.
Temps. E. 1.
Garr. 87.

*Secondly, where it is said in the said act (if the tenant by the curtesy alien), yet his release with warranty to a disseisor, &c. is within the purview of the statute, for that it is in equal mischief; and if that evasion might take place, the statute should have been made in vain.

(267)*
27 E. 3. 8. 9.
14 E. 4. Garr.
5. Dyer, quarto.
Mar. 148 a.

If tenant by the curtesy be of a seignory, and the tenancy escheat unto him, and after he alieneth with warranty, this shall not bind the issue, unless assets descend; for it is in equal mischief.

22 Ass. 9. & 37.
Temps. E. 1.
Garr. 88.

As to the second clause of the statute of Gloucester, there are two points of law to be observed: 366 a.

Pl. Com. Ful-
merstone's
case, 110 a.
Lib. 8. fol. 53.
Sym's case.

First, that, by the express purview of the statute, if assets do after descend from the father, then the tenant shall have recovery or restitution of the lands of the mother. But in a formedon, if at the time of the warranty pleaded no assets be descended, whereby the demandant recovereth, if after assets descend, there the tenant shall have a *scire facias* for the assets, and not for the land intailed. And the reason hereof is, that if in this case the tenant should be restored to the land intailed, then if the issue in tail aliened the assets, his issue should recover in a formedon; and therefore the sages of the law, to prevent future occasions of suits, resolved the said diversity in the cases abovesaid, upon consideration and construction of the statute of Gloucester, and of the statute *de donis conditionalibus*.

Lib. 8. fol. 58.
54. Sym's
case. Ib. 124.
Mary Ship-
ley's case.
(Doct. Pl. 180.
2 Cro. 15.
Ante, 33 a.
Post, 326 a.)
(268)*

Secondly, it is to be observed, that, after assets descended, the recovery shall be by writ of judgment, which shall issue out of the roll of the justices, &c. And here two things are to be declared and explained. First, by what writ, &c. and that is clear, viz. by *scire facias*. But the second is more difficult; and that is, upon what manner of judgment the *scire facias* is to be grounded: for explanation whereof it is to be understood, that, if the tenant will have benefit of the statute, he must plead the warranty, and acknowledge the title of the demandant, and pray that the advantage of the statute may be saved unto him, and then if after assets *descend, the tenant upon this record shall have a *scire facias*: and if assets descend but for part, he shall have a *scire facias* for so much. But if the tenant plead the warranty, and plead further that assets descended, &c. and the demandant taketh issue that assets descended not, &c. which issue is found for the demandant, whereupon he recovereth, the tenant, albeit assets do after descend, shall never have a *scire facias* upon the said judgment; for that by his false plea he hath lost the benefit of the said statute.

8 E. 2. ut
Garr. 81.
18 E. 2. 51.

Touching the third, sufficient hath been spoken before. For the last, it is to be observed, that if the husband be seised of lands in the right of his wife, and maketh a feoffment in fee with warranty, the wife dieth, and the husband dieth, this warranty shall not bind the heir of the wife without assets, albeit the husband be not tenant by the curtesy. But of this you shall read more hereafter.

Vid. sect. 725.

In the mean time know this, that the learning of warranties is one of the most curious and cunning learnings of the law, and of great use and consequence.

LITTLETON.
[Sect. 738.
381 a.]
Exception
therein as to
alienation by
fine, intended
of a fine by
both husband
and wife.

ALSO, it is spoken in the end of the said statute of Gloucester, which speaketh of the alienation with warranty made by the tenant by the curtesy in this form. Also, in the same manner, the heir of the woman after the death of the father and mother shall not be barred of action, if he demandeth the heritage or the marriage of his mother by writ of entry, that his father aliened in his mother's time, whereof no fine is levied in the king's court: and so by force of the same statute, if the husband of the wife alien

the heritage or marriage of his wife in fee with warranty, &c. by his deed in the country, it is clear law, that this warranty shall not bar the heir, unless he hath assets by descent (19).

*BUT the doubt is, if the husband alien the heritage of his wife by fine levied in the king's court with warranty, &c. if this shall bar the heir without any descent in value (20). *And as to this, I will here tell certain reasons, which I have heard said in this matter. I have heard my master Sir Richard Newton, late chief justice of the common pleas, once say in the same court, that such warranty as the husband maketh by fine levied in the king's court shall bar the heir, albeit he (21) hath nothing by descent, because the statute saith (whereof no fine is levied in the king's court (22)); and so by his *opinion this warranty by fine (23) remaineth yet a collateral warranty, as it was at the common law, not remedied by the said statute, because the said statute excepteth alienations by fine with warranty.*

LITTLETON.
[Sect. 729.
381 b.]
(269)*
(2 Inst. 294.)

*382 a.

AND some others have said, and yet do say the contrary, and this is their proof, that as by the same chapter of the said statute it is ordained, that the warranty of the tenant by the curtesy shall be no bar to the heir, unless that he hath assets by descent, &c. although that the tenant by the curtesy levy a fine of the same tenements with warranty, &c. as strongly as he can, yet this warranty shall not bar the heir, unless that he hath assets by descent, &c. And I believe that this is law; and therefore they say, that it should be inconvenient to intend the statute in such manner, as a man that hath nothing but in right of his wife, might by fine levied by him (24) of the same (25) tenements which he hath but in right of his wife with warranty, &c. bar the heir of the same tenements without any descent of fee-simple, &c. where the tenant by the curtesy cannot do this.

LITTLETON.
[Sect. 730.
382 a.]

"That it should be inconvenient." Argumentum ab inconvenienti, is very forcible in law, as often hath been observed.

383 a.
Vid. sect. 57,
&c.

*BUT they have said, that the statute shall be intended after this manner, scilicet, where the statute (26) saith, whereof no fine is levied in the king's court, that is to say, *whereof no lawful fine is rightfully levied in the king's court. And that is whereof no fine of the husband and his wife is levied *in the king's court, for at the time of the making of the said statute, every estate of lands or tenements that any man or woman had which should descend to his heir was fee-simple without condition, or upon certain conditions in deed or in law. And because that then such fine might rightfully be levied by the husband and his wife, and the heirs of the husband should warrant, &c. such warranty*

LITTLETON.
[Sect. 731.
382 a.]
(Plowd. 57 b.
Ante, 115 a.
Post, 380 a.
Ant. 389 a.
381 b.) (10
Rep. 43. Ante,
381 b.)
*382 b.
(270)*

(19) This section not in L. and M. nor Roh.

(20) &c. added L. and M. and Roh.

(21) *ad-n-ad*, L. and M. and Roh.

(22) &c. added in L. and M. and Roh.

(23) &c. added in L. and M. and Roh.

(24) *mesme*, added in L. and M. and Roh.

(25) *mesmes*, not in L. and M. nor Roh.

(26) *dit-parle*, L. and M. and Roh.

shall bar the heir (27), and so they say, that this is the meaning of the statute, for if the husband and his wife should make a feoffment in fee by deed in the country, his heir after the decease of the husband and wife shall have a writ of entry sur cui in vita, &c. notwithstanding the warranty of the husband, then if no such exception were made in the statute of the fine levied, &c. then the heir should have the writ of entry, &c. notwithstanding the fine levied by the husband and his wife, because the words of the statute before the exception of the fine levied, &c. are general, viz. that the heir of the wife after the death of the father and mother is not barred of action, if he demand the heritage or the marriage of his mother by writ of entry, that his father aliened in the time of his mother, and so albeit the husband and wife aliened by fine, yet this is true, that the husband aliened in the time of the mother, and so it should be in that case of the statute, unless that such *words were, viz. whereof no fine is levied in the king's court; and so they say, that this is to be understood, whereof no fine by the husband and his wife is levied in the king's court, the which is lawfully levied in such case; for if the justices have knowledge, that a man that hath nothing but in the right of his wife, will levy a fine in his name only, they will not neither (28) ought they to take such fine to be levied by the husband alone without (29) his wife, &c. Ideo quare of this matter, &c. (30).

*383 a.
(2 Inst. 294.)

383 a.
Sect. 731.
(o) 32 H. 6. 62.
5 E. 3. 56. 2
Elix. Dyer
178. 1 H. 7. 9.
1 Mar. 80. 4
E. 3. 41. 7
Elix. Dyer
246.

(271)*

(p) Bracton,
331. Fleta,
lib. 5. cap. 34.
8 E. 2. Gar.
81. 18 E. 3. 51.
7 E. 3. 84.
Pl. Com. 57.
(3 Rep. 77.)
Sect. 731.

"For if the justices have knowledge, &c." Hereby it appeareth (o) that the judge, if he knoweth it, ought not to take knowledge of a fine that worketh a wrong to a third person.

*"I have heard my master Sir R. Newton, &c." Sir R. Newton was a gentleman of ancient family; in Latin, *de novâ villâ*; in French, *de neuve ville*; and a reverend learned judge, and worthily advanced to be chief justice of the court of common pleas, whom our author remembers with great reverence, as by his words you may perceive, calling him his master, and citeth his opinion delivered once in the court of common pleas, which our author heard and observed (whose example therein it is necessary for our student to follow); but the latter opinion (as hath been before observed) being Littleton's own, is against the opinion of the Lord Newton, (p) and the law is holden clearly with our author at this day; and our author (as in all other cases) hath good authority in law to warrant his opinion; *Nullius hominis autoritas tantum apud nos valere debet, ut meliora non sequeremur si quis attulerit.*

Of the rest of these three sections sufficient hath been said before.

LITTLETON.
[Sect. 731.
383 a.]
The words
"Heritage or

ALSO, it is to be understood, that in these words, where the heir demands the heritage, or the marriage of his mother, this word (or) is a disjunctive, and is as much to say, if the heir demand

(27) &c. added in L. and M. and Roh.
(28) *unque*, not in L. and M. nor Roh.

(29) *noame*, added in L. and M. and Roh.
(30) &c. not in L. and M. nor Roh.

*the heritage of his mother, viz. the tenements that his mother had in fee-simple by descent or by purchase, or if the heir demand the marriage of his mother, that is *to say, the tenements that were given to his mother in frank-marriage.*

marriage of the mother" extend to lands in fee or tail, by descent or purchase.
*383 b.

Some do expound heritage of the mother, to be the lands which the mother hath by descent; and that construction is true; but the statute by the authority of Littleton, extended also where the mother hath it by purchase in fee-simple; for so saith Littleton himself, that this word (inheritance) is not only intended where a man hath lands by descent, but where a man hath a fee-simple by purchase, because his heirs may inherit him. And albeit it be true, that the statute extendeth to an estate in frank-marriage acquired by purchase, yet doth it extend also to all estates in tail, as well by descent as by purchase, for that frank-marriage is put but for an example.

383 b.
(Ante, 16 a.)
Vid. sect. 2.

*But notwithstanding this statute, if feme tenant in dower had aliened in fee with warranty, and died, the warranty had bound the heir until the statute (q) of 11 H. 7. since our author wrote: by which statute the heir may enter, notwithstanding such warranty.

(272)*
365 b.
Alteration in the common law by the statute 11 H. 7. cap. 20. restraining alienation with warranty by tenants in dower, &c. of their husband's inheritances.
(q) 11 H. 7. cap. 20. (Post, 380 a. 381 a.)

But note, there is a diversity between a warranty on the part of the mother, and an estoppel; for an estoppel of the part of the mother, shall not bind the heir, when he claimeth from the father: as if lands be given to the husband and wife, and to the heirs of the husband, the husband make a gift in tail, and dieth, the wife recovereth in a *cui in vita* against the donee, supposing that she had fee-simple, and make a feoffment, and dieth, the donee dieth without issue, the issue of the husband and wife bring a formedon in the reverter against the feoffee; and notwithstanding that he was heir to the estoppel, and the mother was estopped, yet, for that he claimed the land as heir to his father, he was not estopped. Note, that warranties are favoured in law, being part of a man's assurance; but estoppels are odious.

18 E. 3. 9.

(Hob. 81 a.
Rep. 54 a.)

If a woman had been tenant for life, the remainder or reversion to her next heir, and the woman had aliened in fee, and died, this warranty had barred her heir in remainder or reversion; but this is partly holpen by the said act of 11 H. 7. viz. where the woman hath any estate for life of the inheritance or purchase of her husband, or given to her by any of the ancestors of the husband, or by any other person seised, to the use of her husband, or of any of his ancestors, there her alienation, release or confirmation with warranty shall not bind the heir.

construction of this statute.

11 H. 7. cap. 20. Vid. sect. 595. See this statute of 11 H. 7. ca. 20. well explained lib. fol. 176. in Sir Anthony

Mildmay's case, 3 & 4 Ph. & Mar. Dyer 146. Lib. 3. fol. 59, 60, 61, 62. Lincoln Coll. case. Pl. Com. fol. 56. 20 Eliz. Dyer 362. Doct. & Stud. 56. 8 Eliz. Dyer 248. 19 Eliz. Dyer 354. 21 Eliz. Dyer 362. Lib. 3. fol. 50, 51. Sir George Browne's case. Lib. 3. fol. 79. Fitzh. case. 27 H. 8. 23.

To the authorities quoted in the margent, which may serve as commentaries upon the said statute, I will only add two cases. The one was, (r) a man seised of lands in fee levied a fine to the use of himself for life, and after to the use of his wife, and of the heirs male of

(r) Mich. 13 Jac. inter Harley and

West in ejection
firmus in Communi
Banco-Lincoln.

(973)*

(s) Pasch. 17
Eliz. (4 Rep.
10. Post. 380
a. Ante, 115 a.
Post. 369 a.
381 a. Sid. 24.
Plo. 105 a.
Dyer 64 b. Jo.
31. Hob. 332.
Cro. Eliz. 2.
2 Cro. 475.
Ben. 40. 2
Inst. 681. W.
Jones, 13. &
264. Palm. 21.
32. 215. Cro.
Car. 244. pl.
464.) Com.
Banco-Lat-
ton's case,
which I my-
self heard
and observ-
ed. (2 Rol.
Abr. 141.
Moor 93.)
*366 a.

Sect. 725.
(1 Rep. 66,
Post. 367 b.
368 b. 10 Rep.
86.)

(974)*

365 a.
Alteration in
the common
law by the
stat. de donis,
restraining
alienation
with warren-
ty by tenants
in tail.
Brac. l. 4. fol.
321 b. Fleta,
l. 5. c. 34. 7 E.
3. Gar. 47.

her body by him begotten, for her jointure, and had issue male, and after he and his wife levied a fine, and suffered a common recovery, the husband *and wife died, and the issue male entered by force of the said statute of 11 H. 7. And it was holden by the justices of assise, (the case coming down to be tried by *nisi prius*), that the entry of the issue male was lawful : and yet this case is out of the letter of the statute ; for she neither levied the fine, &c. being sole, or with any other after taken husband, but is by herself with her husband that made the jointure (E 1). *Sed qui hæret in literâ hæret in cortice* ; and this case being in the same mischief, is therefore within the remedy of the statute, by the intendment of the makers of the same, to avoid the disherison of heirs, who were provided for by the said jointure, and especially by the husband himself that made the jointure, which (as it was said) is a stronger case than the example set down in the statute. The other was (s) a man is seised of *lands in the right of his wife, and they two levy a fine, and the conusee grant and rendereth the land to the husband and wife in special tail, the remainder to the right heirs of the wife, they have issue, the husband dieth, the wife taketh another husband, and they two levy a fine in fee, and the issue entereth, this is directly within the letter of the statute, and yet it is out of the meaning ; because the state of the land moved from the wife, so as it was the purchase of the husband in letter, and not in meaning. But where the woman is tenant for life, by the gift or conveyance of any other, her alienation with warranty shall bind the heir at this day. So, if a man be tenant for life (otherwise than as tenant by the curtesy), an alien in fee with warranty, and dieth, this shall at this day bind the heir that hath the reversion or remainder by the common law not holpen by any statute (F 1). But all this is to be understood, unless the heir that hath the reversion or remainder doth avoid the estate so aliened in the life of the ancestor ; for then the estate being avoided, the warranty, being annexed unto the estate, is avoided also ; whereof more shall be said in this chapter in his proper place. And therefore it is necessary for the heir in *such cases to make an entry as soon as he hath notice or probable suspicion of such an alienation.

“ *Before the statute of Gloucester all warranties were bars to the same heirs to demand any lands, &c.*” For the statute, as hath been said, being made in 6 E. 1. was before the statute of *Donis conditionalibus*, which was enacted 13 E. 1. when all states of inheritance were fee-simple. But after the statute of 13 E. 1. the heir in tail is not barred by the warranty of his ancestor, unless there be assets, as shall be said hereafter more largely in this chapter.

(E 1) But it is now settled, that an alienation by the husband and wife jointly, is not restrained by the statute 11 H. 7. c. 20, though it is not within the express words of the saving clause. See *Kirkman v. Thompson*, Cro. Jac. 474. *Whately v. Kemp*, cited 2 Ves. 358. 1 Prest. Conv. 20.—[Ed.]

(F 1) But by a statute made since Lord Coke's time, all warranties made by tenant for life, descending on him in reversion or remainder, are void. *Stat. 4 and 5 Ann. c. 16.* See *infra*, n. (L 1).—[Ed.]

WARRANTY lineal is, where a man seised of lands in fee (31) maketh a feoffment by his deed to another, and binds himself and his heirs to warranty, and hath issue, and die, and the warranty descend to his issue, that is a lineal warranty. And the cause why (32) this is called lineal warranty, is not because the warranty descendeth from the father to his heir; but the cause is, for that if no such deed with warranty had been made by the father, then the right of the tenements should descend to the heir, and the heir should convey the descent from (33) his father, &c.

FOR, if there be father and son, and the son purchase (34) lands in fee, and the father of this disseiseth his son, and (35) alieneth to another in fee by his deed, and by the same deed bind him and his heirs to warrant the same tenements, &c. and the father dieth; now is the son barred to have the said tenements; for he cannot by any suit, nor by other mean of law, have the same lands by cause of the said warranty. And this is a collateral warranty; and yet the warranty descendeth lineally from the father to the son.

*BUT because, if no such deed with warranty had been made, the son in no manner could convey the title which he hath to the tenements from his father unto him, inasmuch as his *father had no estate in right in the lands; wherefore *such warranty is called collateral warranty, inasmuch as he that maketh the warranty is collateral to the title of the tenements: and this is as much to say, as he to whom the warranty descendeth, could not convey to him the title which he hath in the tenements by him that made the warranty, in case that no such warranty were made.*

Here Littleton putteth an example, proving that it is not called lineal, because it descendeth lineally from the father to the son; for in this case the warranty descendeth lineally, and yet is a collateral warranty. In this example you must intend that the disseisin was not of intent to alien with warranty to bar the son; but here the disseisin being done to the son, without any such intent, the alienation afterwards with warranty doth bar the son; because that albeit the warranty doth lineally descend, yet seeing the title is collateral, that is, that the son claimeth not the land as heir to his father, therefore, in respect of the title, it is a collateral warranty. And thus doth Littleton agree (t) with the authority of our books. So as the diversities do stand thus. First, where the disseisin and feoffment are *uno tempore*, and where at several times. Secondly, where the disseisin is with intent to alien with warranty, and where the disseisin is made without such intent, and the alienation with warranty afterwards made (*).

LITTLETON.
[Sect. 703.
370 a.]

Diversity between lineal and collateral warranty, as to their nature.

Where the heir on whom a warranty descends, might possibly claim the land as heir to the warranting ancestor, whether as heir lineal or collateral, the warranty is lineal.

LITTLETON.
[Sect. 704.
370 b.]

Where he could not by any possibility inherit the land from the warranting ancestor, it is collateral:

8 Rep. 51.

LITTLETON.
[Sect. 705.
370 b.]

*371 a.

(275)*

371 a.
5 E. 3. 14.
46 E. 3. 6.
19 H. 8. 12.
8 R. 2. Garr.
100. Vid. sect.
716.

(t) 46 E. 3. 6.
5 E. 3. 14.
19 H. 8. 12.

(31) *Et* added in L. and M. and Roh.

(32) *ceo*, added in L. and M. and Roh.

(33) *son—le*, L. and M. and Roh.

(34) *terres—tenements*, L. and M. and Roh.

(35) *ceo*, added in L. and M. and Roh.

(*) See *infra*, 367 a.

370 a. - A warranty lineal is a covenant real annexed to the land by him
 (1 Rep. 1.) which either was owner, or might have inherited the land, and from
 whom his heir lineal or collateral might by possibility have claimed
 (Post, 371 a. the land as heir from him that made the warranty ; whereof Little-
 375 a.) ton himself putteth divers cases, which shall be explained in their
 proper places. And in this case put in section 703., Littleton (once
 for all) sheweth, that the reason of the example here put, is because
 if no such alienation with warranty (for so is Littleton to be intend-
 ed) had been made, the very lands had descended to the heir, so as
 the case being put of lands in fee-simple, the alienation without the
 warranty had barred the heir. And note that is called a lineal war-
 ranty, not because it must descend upon the lineal heir ; for, be the
 (3 Rep. 59.) heir lineal or collateral, *if by possibility he might claim the land
 35 E. 3. from him that made the warranty, it is lineal ; having regard to the
 Garr. 73. warranty, and title of the land. And also it is called lineal, in re-
 (376)* spect that the warranty made by him that had no right or possibility
 of right to the land, is called collateral, in regard that it is collateral
 to the title of the land (G 1).

which is so
 called be-
 cause it is
 collateral to
 the title of the
 land.

LITTLETON. *ALSO, if there be grandfather, father, and son, and the grand-*
 [Sect. 706. *father is disseised, in whose possession the father releaseth by his*
 371 a.] *deed with warranty, &c. and dieth, and after the grandfather*
dieth ; now the son is barred to have the tenements by the war-
ranty of the father. And this is called a lineal warranty,
because if no such warranty were, the son could not convey the
right of the tenements to him, nor show how he is heir to the
grandfather but by means of the father.

371 a.
 1 H. 4. 33.
 35 E. 3.
 Garr. 73.

Here Littleton putteth an example where the son must claim the
 land as heir to his grandfather ; and yet, because he cannot make
 himself heir to his grandfather but by his father, it is lineal.

And it is to be observed, that the warranty in this case descended
 upon the son, before the descent of the right, which happened by
 the death of the grandfather, in whom the right was. Vide Little-
 ton, cap. de Releases, and after in this chapter, sect. 707. and 741.

LITTLETON.
 [Sect. 707.
 371 b.]

ALSO, if a man hath issue two sons, and is disseised, and the
eldest son release to the disseisor by his deed with warranty, &c.

(G 1) The chief distinction between lineal and collateral warranties consists in this :
 when the person on whom the warranty descends (who must always be the heir at common
 law) might possibly claim the lands as heir to the warrantor (whether as heir lineal or
 collateral) then the warranty is lineal. But when the person on whom it descends, does not
 claim the lands as heir to the person warranting, then the warranty is collateral. Watk.
 Gilb. Ten. 402. But lineal warranty may be, though the heir does not make his title
 immediately as heir to the warrantor, infra, sect. 706 ; or though he does not derive from
 him alone. Infra, s. 714. But he must claim as heir ; for if a man, having issue three sons,
 gives land to the eldest, and the heirs of his body, and, for want of such issue, to the
 middle son, and the heirs of his body, the remainder to the third in tail, and the eldest aliens
 with warranty, and dies without issue, the warranty is collateral to the middle son ; for,
 though he is heir at law to the eldest son, yet he does not claim as heir, but as purchaser.
 Infra, sect. 716. As to the different operation of lineal and collateral warranty, see infra,
 373 b.—[Ed.]

and dies without issue, and afterwards the father dieth, this is a lineal warranty to the youngest son, because, albeit the eldest son died in the life of the father, yet by possibility it might have been, that he might convey to him the title of the land by his elder brother, if no such warranty had been. For it might be, that, after the death of the father, the elder brother entered into the tenements, and died without issue, and then the younger son shall convey to him the title by the elder (36) son. (377)*

Here Littleton putteth an example, where the heir, that is to be barred by the warranty, is not to make his descent by him that made the warranty, as in the case before; and yet, because by possibility he might have claimed by the eldest son, if he had survived the father, and died without issue, and so the younger brother might by possibility have been heir to him, the warranty is lineal.

And here it is to be noted, that the warranty of the eldest son descended before the right descended; whereof more shall be said hereafter, sect. 741; and the opinion of Littleton in this case is holden for law, against the opinions in 35 E. 3. Gar. 73.

BUT in this case, if the younger son releaseth with warranty to the disseisor, and dieth without issue, this is a collateral warranty to the elder (37) son, because that of such land as was the father's the elder by no possibility can convey to him the title by means of the younger (38) son. LITTLETON. [Sect. 707. 371 b.]

"But in this case, if the younger son releaseth with warranty, &c." This warranty in this case is collateral to the eldest son, and to the issue of his body; but if the eldest son dieth without issue of his body, then the warranty is lineal to the issue of the body of the youngest: and so the warranty, that was collateral to some persons, may become lineal to others.

*AND note, that as to him that demandeth fee-simple by any of his ancestors, he shall be barred by warranty lineal which descendeth upon him, unless he be restrained by some statute.

BUT he that demandeth fee-tail by writ of formedon in descender, shall not be barred by lineal warranty, unless he hath assets by descent in fee-simple by the same ancestor that made the warranty. But collateral warranty is a bar to him that demandeth fee, and also to him that demandeth fee-tail, without any other descent of fee-simple, except in cases which are restrained by the statutes, and in other cases for certain causes, as shall be said hereafter (1). LITTLETON. [Sect. 711. 373 b.]

(36) *fits*, not in L. and M. nor Roh.
(37) *fits*, not in L. and M. nor Roh.

(38) *fits*, not in L. and M. nor Roh.

(1) The observations of Lord Vaughan on this section, and the comment upon it, deserve attentive perusal. See Vaugh. 375.—[Butler.]

374 b.

In these two sections there are expressed four legal conclusions:

3 E. 3. 22. 4
K. 3. 28. 50.
6 E. 3. 56.
7 E. 3. 54. 57.
9 E. 3. 16.
10 E. 3. 14.
15 E. 3. Garr.
27. 20 E. 3.
Ibid. 29. 25
E. 3. 50. 27
E. 3. 53. 41
E. 3. Garr. 16.
Mich. 38 E. 3.
Coram rege
Abbot de Col-
chester's
case. 45 Ass.
6 Pl. Com.
554. 19 E. 4.
10. Vid. sect.
703. 747.

First, that a lineal warranty doth bind the right of a fee-simple.

Secondly, that a lineal warranty doth not bind the right of an estate tail, for that it is restrained by the statute of *donis conditionalibus*.

Thirdly, that a lineal warranty and assets is a bar of the right in tail, and is not restrained (as hath been said) by the said act.

Fourthly, that a collateral warranty made by a collateral ancestor of the donee, doth bind the right of an estate tail, albeit there be no assets; and the reason thereof is upon the statute of *donis conditionalibus*, for that it is not made by the tenant in tail, &c. as the lineal warranty is.

(Moor 96. Ac-
cord. Vaugh.
352. contra.
See Vaugh.
365.)

(279)*

To this may be added, that the warranty of the donee in tail, which is collateral to the donor, or to him in remainder, being heir to him, doth bind them without any assets. For though the alienation of the donee after issue doth not bar the donor, which was the mischief provided for by the act, yet the warranty being collateral doth bar both of *them (11); for the act restraineth not the warranty, but it remaineth at the common law, as Littleton after saith: and in like manner the warranty of the donee doth bar him in the remainder.

What deem-
ed sufficient
assets to
make a lineal
warranty a
bar.
Flota, lib. 2.
cap. 65. Brit.
185. 4 E. 3.
Garr. 63. 16
E. 3. Ass. 4.
43 E. 3. 9.
7 H. 6. 3. 11
H. 4. 20.
(2 Rol. Abr.
774. 775.)
24 E. 3. 47.

"Assets, (id est) quod tantundem valet," sufficient by descent.

(8 Rep. 56.)

(u) 31 E. 3.
Ass. 5. 13 E. 3.
Recoverie in
value 17.
Lib. 3. fol. 31.
Butler and
Baker's case.

Note, assets requisite to make a lineal warranty a bar must have six qualities. First, it must be assets (that is) of equal value or more at the time of the descent. Secondly, it must be of descent, and not by purchase or gift. Thirdly, as Littleton here saith, it must be assets in fee-simple, and not in tail, or for another man's life. Fourthly, it must descend to him as heir to the same ancestor that made the warranty, as Littleton also, here saith. Fifthly, it must be of lands or tenements, or rents, or services valuable, or other profits issuing out of lands or tenements, and not personal inheritances, as annuities, and the like. Sixthly, it must be in state or interest, and not in use or right of actions or rights of entry, for they are no assets until they be brought into possession. (u) But if a rent in fee-simple issuing out of the land of the heir descend unto him whereby it is extinct, yet this is assets, and to this purpose hath in judgment of law a continuance.

(11) But according to Lord C. J. Vaughan, the statute *de donis* restrains the collateral warranty of donee in tail from barring the donor or his heirs, because his warranty falling upon the donor, or his heir, can be no other than a collateral warranty. See *Bole v. Horton*, Vaugh. 360. No judgment however was given in this case, the Court being divided; Vaughan and Archer for the demandant; and Wylde and Atkyns for the tenant: but Vaughan's opinion is generally held to be law.—[Ed.]

(w) A seignory in frankalmoign is no assets because it is not valuable, and therefore not to be extended; and so it seemeth of a seignory of homage and fealty. But an advowson is assets, whereof (x) Fleta saith; *Item de ecclesiis quæ ad donationem domini pertinent quot sunt, et quæ, et ubi, et quantum valeat quæ liber ecclesia per annum secundum veram ipsius æstimationem, et pro marcâ solidos extendatur, ut si ecclesia centum marcas valeat per annum, ad centum solidos extendatur advocatio per annum* (κ 1). And herewith *agreeth Britton, and others have reckoned a shilling in the pound; and Britton addeth further, *mes si la advowson duist estre vendue, adonques serr' le reasonable price solongue le value en un an a cel extent*. Wherein it is to be observed, that antiquity did ever reckon by marks.

(w) 11 E. 3.
Messe 7.
Registrem
293.

(x) Fleta, l. 2.
cap. 65. (N)
Britt. fol. 185.
Extent. Ma-
nerii. 5 H. 7.
37. 22 H. 6.
21. 33 E. 3.
Garr. 102.

(280)*

ALSO, if tenant in tail discontinue the tail, and hath issue, and dieth, and the uncle of the issue release to the discontinuee with warranty, &c. and dieth without issue, this is a collateral warranty to the issue in tail, because the warranty descendeth upon the issue, that cannot convey himself to the intail by means of his uncle.

LITTLETON.
[Sect. 709.
373 a.]

Warranty of
the uncle of
issue in tail,
to the discon-
tinuance, a col-
lateral war-
ranty and
bar (at com-
mon law).

373 a.

Pl. Com. fol.
307 a. in Sha-
rington's
case. (2 Rol.
Abr. 745.)
(Ante, 374 b.)

(3 Rep. 59.)

(Ante, 6 b.)

The reason wherefore the warranty of the uncle, having no right to the land intailed, shall bar the issue in tail, is, for that the law presumeth that the uncle would not unnaturally disherit his lawful heir, being of his own blood, of that right which the uncle never had, but came to the heir by another mean, unless he would leave him greater advancement. *Nemo præsumitur alienam posteritatem suæ prætulisse*. And in this case the law will admit no proof against that which the law presumeth. And so it is of all other collateral warranties; for no man is presumed to do any thing against nature.

(y) It hath been attempted in parliament, that a statute might be made, that no man should be barred by a warranty collateral, but where assets descend from the same ancestor (L 1); but it never took effect (39), for that it should weaken common assurances (1) (M 1).

373 b.

(y) Rot. Parl.
50 E. 2. Num.
77.

(39) However, it hath been effected in our days, for by 4 Ann. cap. 16. sect. 21, all war-

(κ 1) An advowson shall be assets in a formedon, because it is an advantage to him to advance his blood or friend. 9 H. 6. 52 b. 57. But, per Keble, an advowson is no assets, for it is not valuable; but Davers and Vavasor, contra; for it shall be valued for every 20l. per ann. of the advowson at 20s. Br. Assets per Descent, pl. 21, cites 5 H. 7. 37. See further as to what shall be deemed sufficient assets to make a lineal warranty a bar, 22 Vin. Abr. 158—160. (X. b.) (Y. b.) (Z. b.) (A. c.)—[Ed.]

(N) See Fleta, lib. 2. cap. 71. § 10.

(L 1) In the case of *The Earl of Bath v. Sherwin*, Lord Chancellor Cowper said, that a collateral warranty was certainly one of the harshest and most cruel points of the common law; because there was not so much as an intended recompense; yet he could not find that chancery had ever given relief in it. 10 Mod. 3, 4. See the next note.—[Ed.]

(1) See Mr. Butler's note at the end of the volume, Note VII.

(M 1) All warranties, except those commencing by disseisin, were binding at common

- (281)* **ALSO, if tenant in tail hath issue three sons, and discontinue*
 (282)* *the tail in fee, and the middle son release by his *deed to the dis-*

rancies since the first day of trinity term, anno dom. 1705, by any tenant for life, of any lands, tenements, or hereditaments, coming or descending to any person in reversion or remainder, are void and of no effect: and all

collateral warranties made since then of any lands, tenements, or hereditaments, by any ancestor who had no estate of inheritance in possession, the same is void against the heir. —[*Note to the 11th edition.*]

law; for a recompense was presumed to be given, which was then either in land, by way of exchange, or in money, which was turned into land, and descended to the heir; and therefore the time of limitation for the heir to claim was during the life of the ancestor; otherwise the estate of the purchaser, which subsisted on the warranty of the ancestor, should never be defeated by such heir who ought to defend it; and if such warranties were not binding, there might have been many secret conveyances, for the benefit of the heir, to defraud the purchaser. And in that age, when the building up of families, and establishing them in seats and tenures was the whole business of the times, they presumed that no man would destroy his heir's right for his own present advantage. Gilb. Ten. 141.

The first statute restraining the operation of warranties, was the statute of Gloucester, 6 Ed. 3. c. 3. which enacted, that if a tenant by the curtesy aliened the estate which he held by the curtesy, with warranty, his son should not be barred by such warranty, unless he inherited lands of equal value from his father.

The next statute by which the operation of warranties was qualified, was the statute *De donis*, which first made the distinction between lineal warranty and collateral warranty; for before this statute all warranties were binding on the heirs at law, as well where a man had title to the lands, as where he had not; because, after such warranty and acquiescence, a recompense was presumed to descend, instead of the land itself. But the statute *De donis* only barred the alienation of tenant in tail; therefore the lineal warranty was within the statute, but the collateral warranty was left as it was by the common law: and hence arose the distinction between lineal and collateral warranty, which is thus accounted for by Lord C. B. Gilbert. The statute *De donis* was only a general appointment that the will of the donor should be observed; so that the tenant in tail should not alien to the disinheritor of the issue, and of him in reversion. But it was left to the king's courts to mould such estates, and to make rules to prevent such alienations; and none were more necessary than to restrain these warranties. The judges therefore held, first, that the warranty of tenant in tail, or of any person entitled under the intail, should be no bar, unless assets descended: which rule was adopted by analogy to what the legislature had done by the stat. of Glouc. in the case of tenant by the curtesy. And the same principle seems to extend to the reversion of the person creating the intail, for the statute *De donis* is as precise in the protection of the donor's reversion, as of the estate tail itself; and therefore it may be concluded that no warranty of the tenant in tail will rebut the donor from claiming the reversion upon the determination of the estate tail. *Bole v. Horton*, Vaugh. 360. Secondly, the courts held, that a collateral warranty was not within the statute; for as the statute only appointed that the will of the donor should be observed, that the tenant in tail should not alien to disinherit his issue, the judges would not extend it to collaterals, who did not take by the gift, and who therefore could not be forbidden from barring by their warranty. And they did not in this case oblige the tenant to show assets; for assets were presumed, as it was before, if the whole matter were transacted during the life of tenant in tail, and he did not enter to disannul it. Gilb. Ten. 144—146. With respect to remainders expectant on estates tail, there is nothing in the statute *De donis*, which, either directly or indirectly, restrains the tenant in tail from barring them by his warranty; and, therefore, the operation of a warranty in rebutting remainders, expectant upon estates tail, remains as it was before the statute; so that such warranty will now bar them without assets. *Syme's case*, 8 Co. 51. b. *Bole v. Horton*, supra.

The next statute which restrained the operation of warranty, was the 11 H. 7. c. 20, which enacts, that in case a wife, after the death of her husband, shall alone, or with any subsequent husband, alien with warranty any lands which she holds in dower, or of which she is seised in tail, of the gift of her former husband, or of any of his ancestors, such warranty shall be void.

And lastly, the 4 & 5 Ann. c. 16. s. 21, enacts, that all warranties made, after the first day of Trinity term, by any tenant for life, of any lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void and of

continuee, and bind him and his heirs to warranty, &c. and after the tenant in tail dieth, and the middle son dieth without issue, now the eldest son is barred (N 1) to have any recovery by writ of formedon, because the warranty of the middle brother is collateral to him, inasmuch as he can by no means convey to him by force of the tail any descent by the middle, and therefore this is a collateral warranty. But in this case if the eldest son die without issue, now the youngest brother may well have a writ of formedon in the descender, and shall recover the same land, because the warranty of the middle is lineal to the youngest son, for that it might be, that by possibility the middle might be seised by force of the tail after the death of his eldest brother, and then the youngest brother might convey his title of descent by the middle brother.

LITTLETON.
[Sect. 708.
372 a.]
Warranty of
tenant in
tail's middle
son, a colla-
teral war-
ranty, and bar to
the eldest son
(at common
law):
secus as to
the youngest
son.

Hereby it also appeareth, that a warranty that is collateral in respect of some persons, may afterwards become lineal in respect of others. Whereupon it followeth, (*) that a collateral warranty doth not give a right, but bindeth only a right so long as the same continueth: but if the collateral warranty be determined, removed, or defeated, the right is revived. (z) And yet in an assise the plaintiff hath made his title by a collateral warranty.

372 a.
(Dr. & Stud.
153b. 8 R. 2.
Garr. 101.
(*) 43 Ass. 44.
24 H. 6. 01.
Talle. Br.
7 H. 5. 6. 11.
Ass. 369. 34
E. 3. Drult.
29. 19 H. 6.
59. 21 H. 7.
40. 5 H. 7. 29.
3 H. 7. 9b.
(z) 16 Ass. p.
16. 27 Ass. 74.
29 Ass. 50.
43 Ass. 8.
14 H. 4. 13.
19 H. 6. 60.
4 H. 7. c. 24.
& 32 H. 8. c. 38.
(283)*
(10 Rep. 43.)

Here Littleton putteth an example of a bar of an estate tail by a collateral warranty. It is to be observed, that in some cases an estate tail may be barred by some acts of parliament made since Littleton wrote; and in some cases an estate tail cannot be barred, which might when Littleton wrote have been barred. For example, if tenant in tail levy a fine *with proclamations according to the statute, this is a bar to the estate tail, but not to him in reversion or remainder, if he maketh his claim or pursue his action within five years after the estate tail spent (o 1).

(a) If tenant in tail in possession, or that hath a right of entry, be attainted of high treason, the estate tail is barred, and the land is forfeited to the king; and none of these were barred when Littleton wrote. A lineal warranty and assets was a bar to the estate tail when Littleton wrote; whereof more shall be said hereafter.

372 b.
(o) 26 H. 8.
c. 13. 33 H. 8.
c. 20. 5 E. 6.
ca. 11. Stanf.
Pl. Coron. 18.

(b) A common recovery with a voucher over, and a judgment to recover in value, was a bar of the estate tail when Littleton wrote.

(b) 12 E. 4. 19.
Taltatum's
case.

none effect; and, likewise, all collateral warranties, which shall be made, after the same day, of any lands, tenements, or hereditaments, by any ancestor who has no estate of inheritance in possession in the same, shall be void against his heir. It is a common mistake, that all collateral warranties are taken away by the 4 and 5 Ann. c. 16, whereas that statute only makes void all warranties by *tenant for life*, and all collateral warranties made by any ancestor, *not having an estate of inheritance in possession*: So that if A. be tenant in tail, remainder to B. his next brother in tail, (which is a very common case, arising upon almost every marriage settlement), and A. being in possession, makes a feoffment with warranty, or levies a fine (in which there is always a warranty) of the estate tail, and dies without issue, this warranty, being collateral to B. who claims by way of remainder, will therefore bar him without assets. Rob. Gav. 125.—[Ed.]

(*) 1 That is, at common law, before the 4 and 5 Ann. c. 16.—[Ed.]

(o 1) See post, Chap. 44. Of Alienation by Matter of Record.—[Ed.]

(c) 33 H. 8.
Tille. Br. 41.
Pl. Com. fol.
556. 29 H. 8.
Dyer, 52.

(c) If the king had made a gift in tail, and the donee had suffered a common recovery, this should have barred the estate tail in Littleton's time, but not the reversion or remainder in the king. And so, if such a donee had levied a fine with proclamations after the statute of 4 H. 7., this had barred the estate tail, although the reversion was in the king (1). (d) But since Littleton wrote, a common recovery had against tenant in tail of the king's gift, or such a fine levied by him, the reversion continuing in the crown, is no bar to the estate tail by the statute of 34 H. 8. (p 1).

(d) 34 H. 8.
c. 20.

373 a.
33 E. 3. Judge-
ment 252.
8 H. 6. 55.
10 H. 6. 5.
14 E. 4. 5 b.
14 E. 4. 8.
F. N. B. 134 b.
Pl. Com. 237.
28 E. 3. 95.
F. N. B. 261.

A recovery in a writ of right against tenant in tail, without a voucher, is no bar of any gift in tail.

If tenant in tail, the remainder over in fee, cesse, and the lord recover in a *cessavit*, this shall not bar the estate tail, for the issue shall recover in a *formedon*; neither were either of these bars when Littleton wrote. But let us now hear Littleton.

(284)*
LITTLETON.
[Sect. 710.
373 b.]
On discontinu-
ance with
warranty by
eldest copar-
cener in tail,
the warranty
is collateral,
and a bar (at
common law)
to the young-
est coparce-
ner as to her
own moiety;
secus as to
the other
moiety:

**ALSO, if the tenant in tail hath issue two daughters, and dieth, and elder entereth into the whole, and thereof maketh a feoffment in fee with warranty, &c. and after the elder daughter dieth without issue; in this case the younger daughter is barred as to the one moiety, and as to the other moiety she is not barred. For as to the moiety which belongeth to the younger daughter, she is barred, because as to this (41) part she cannot convey the descent by means of her elder sister, and therefore, as to this moiety this is a collateral warranty. But as to the other moiety, which belongeth to her elder sister, the warranty is no bar to the younger sister, because she may convey her descent as to that moiety which belongeth to her elder sister by the same elder sister, so as to this moiety which belongeth to the elder sister, the warranty is lineal to the younger sister.*

373 b.
(Ante, 169 a.
Post, 243 b.)
See in the
Chapter of
Descent,
sect. 693.

"And the elder entereth into the whole, and thereof maketh a feoffment, &c." Here it is to be understood, that when one coparcener doth generally enter into the whole, this doth not divest the estate which descendeth by the law to the other, unless she that doth enter claimeth the whole, and taketh the profits of the whole; for that shall divest the freehold in law of the other parcener.

Otherwise it is after the parceners be actually seised, the taking of the whole profits, or any claim made by the one, cannot put the other out of possession without an actual putting out or disseisin (q 1). And in this case of Littleton, when one coparcener entereth

*374 a.

(41) *part—moite que affiert luy*, L. and M. and Roh.

(1) "29 H. 8. Dy. 32. accord. tail barred, but not discontinued, because the reversion is in the king: so note the issue is barred by 4 H. 7. Hob. 382, for 32 H. 8. cap. 36, was not then made. Note also, that 32 H. 8. cap. 36, excepts tenant in tail by gift of the king." Lord Nott. MSS. [Butler, Note 322.]

(p 1) As to the construction of this statute, see post, Chap. 44.—[Ed.]

(q 1) See ante, vol. 1. p. 681. n. (c).—[Ed.]

into the whole, and maketh a feoffment of the whole, this devesteth the freehold in law out of the other coparcener.

Now seeing the entry in this case of Littleton devested not the estate of the other parcener, if no further proceeding had been, then it is to be demanded, that seeing the feoffment doth work the wrong, and be the wrong either a disseisin, or in nature of an abatement, how can the warranty annexed to *that feoffment that wrought the wrong be collateral, or bind the youngest sister for her part? To this it is answered, that when the one sister entereth into the whole, the possession being void, and maketh a feoffment in fee, this act subsequent doth so explain the entry precedent into the whole, that now by construction of law she was only seised of the whole, and this feoffment can be no disseisin, because the other sister was never seised; nor any abatement, because they both made but one heir to the ancestor, and one freehold and inheritance descended to them. So as in judgment of law the warranty doth not commence by disseisin, or by abatement, and without question her entry was no intrusion.

(285)*

Pl. Com. 563.
(5 Rep. 51.
Ante, 377 a.)(Sect. 388.
Post, 393 b.)

Tenant in tail hath issue two daughters, and discontinueth in fee, the youngest disseiseth the discontinuee to the use of herself and her sister, the discontinuee ousteth her, against whom she recovereth in an assise, the eldest agreeth to the disseisin, as she may, against her sister, and become joint-tenant with her. And thus is the book in the 21 Assise (e) to be intended, the case being no other in effect; but A. disseiseth one to the use of himself and B.; B. agreeth; by this he is joint-tenant with A.

(e) 21 Ass.
p. 19. (Ante,
160.)

"Hath issue two daughters." If husband and wife, tenants in special tail, have issue a daughter, and the wife die, the husband by a second wife hath issue another daughter, and discontinueth in fee and dieth; a collateral ancestor of the daughters releaseth to the discontinuee with warranty, and dieth, the warranty descendeth upon both daughters, yet the issue in tail shall be barred of the whole; for in judgment of law the entire warranty descendeth upon both of them (r 1).

373 b.
5 E. 2. Garr.
78. Lib. 8.
fol. 41. Sym's
Case.
(10 Rep. 96.)(Post, 367 b.)
(2 Cro. 217,
218.)

ALSO, if land be given to a man, and to the heirs of his body begotten, who taketh wife, and have issue a son between them, and the husband discontinues the tail in fee, and dieth, and after the wife releaseth to the discontinuee in fee with warranty, &c. and dieth, and the warranty descends to the son, this is a collateral warranty.

LITTLETON.
[Sect. 713.
374 b.]Warranty of
tenant in
tail's wife to
his disconti-
nuée, a colla-
teral warrant-
y and bar (at
common law)
to the issue:

(286)*

374 b.

*This case standeth upon the same reason that divers other formerly put by our author do, viz. that because the heir claimeth only from the father *per formam doni*, and nothing from the wife, that therefore the warranty of the wife is collateral, and the warranty made by any ancestor male or female of the wife bindeth

(s 1); and here the warranty descendeth after the descent of the right.

LITTLETON.
[Sect. 714.
375 a.]
secus where
the husband
and wife
were tenants
in special
tail.
(9 Rep. 143 a.
Ante, 137 a.)

BUT if lands be given to the husband and wife, and to the heirs of their two bodies begotten, who have issue a son, and the husband discontinue the tail and dieth, and after the wife release with warranty and dieth, this warranty is but a lineal warranty to the son; for the son shall not be barred in this case to sue his writ of formedon, unless that he hath assets by descent in fee-simple by his mother, because their issue in the writ of formedon ought to convey to him the right as heir to his father and mother of their (42) two bodies begotten per formam doni; and so in this case the warranty of the father and the warranty of the mother are but lineal warranty to the heir, &c.

375 a.
35 E. 3. tit.
Garr. 73.

Here is a point worthy of observation, that albeit in this case the issue in tail must claim as heir of both their bodies, yet the warranty of either of them is lineal to the issue: and yet the issue cannot claim as heir to either of them alone, but of both.

(2 Rol. Abr.
741. Ante,
137 a. Sect.
25.)

If lands be given to a man and to a woman unmarried, and the heirs of their two bodies, and they intermarry, and are disseised, and the husband release with warranty, the wife dieth, the husband dieth, albeit the donees did take by moieties, yet the warranty is lineal for the whole, because, as our author here saith, the issue must in a *formedon* convey to him the right as heir to his father and his mother of their two bodies engendered: and therefore it is collateral for no part.

LITTLETON.
[Sect. 715.
375 a.]
(287)*

*AND note, that in every case where a man demandeth *lands in fee tail by writ of formedon, if any of the issue in tail that hath possession, or that hath not possession, make a warranty, &c. if he which sueth the writ of formedon might by any possibility, by matter which might be en fait, convey to him by him that made the warranty per formam doni, this (43) is a lineal *warranty, and not collateral.*

*375 b.

375 b.
35 E. 3. Garr.
73.

Of this sufficient hath been said before, *sed nunquàm nimis dicitur quod nunquàm satis dicitur*; for it is a point of great use and consequence.

LITTLETON.
[Sect. 716.
375 a.]
On gift in tail
to the eldest
son, remain-
der to the
other sons,
the warranty
of the eldest
son, on his

ALSO, if a man hath issue three sons, and giveth land to the eldest son, to have and to hold to him and to the heirs of his body begotten, and, for default of such issue, the remainder to the middle son, to him and to the heirs of his body begotten, and, for default of such issue (44) of the middle son, the remainder to the youngest son, and to the heirs of his body begotten; in this case, if the eldest (45) discontinue the tail

(42) *deux*, not in L. and M. nor Roh.

(43) *&c.* added in L. and M. and Roh.

(44) *del mulnes*, not in L. and M. nor Roh.

(45) *fit*, added in L. and M. and Roh.

in fee, and bind him and his heirs to warranty, and dieth without issue, this is a collateral warranty to the middle son, and shall be a bar to demand the same land by force of the remainder; for that the remainder is his title, and his eldest brother is collateral to this title, which commenceth by force of the remainder. In the same manner it is, if the middle son hath the same land by force of the remainder, because his eldest brother made no discontinuance, but died without issue of his body, and after the middle make a discontinuance with warranty, &c. and dieth without issue, this is a collateral warranty to the youngest son. And also in this case, if any of the said sons be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right (46) with warranty (47), this is a collateral warranty to that son upon whom the warranty descendeth causâ quâ suprâ.

discontinuing the estate tail, is collateral, and a bar to the other sons: (Vaugh. 377.) (8 Rep. 51.)

(Vaugh. 367. 377.)

AND so note, that where a man that is collateral to the title, (48) and releaseth this with warranty, &c. this is a collateral warranty.

LITTLETON. [Sect. 717. 376 a.]

*Here it appeareth; that it is not adjudged in law a collateral warranty in respect of the blood, for the warranty may be collateral, albeit the blood be lineal; and the warranty may be lineal, albeit the blood be collateral, as hath been said. But it is in law deemed a collateral warranty, in respect that he that maketh the warranty is collateral to the title of him upon whom the warranty doth fall: as by the example which Littleton here putteth, and by that which hath been formerly said, is manifest.

(288)* 376 a. 8 R. 2. Garr. 101. Vid. sect. 704.

ALSO, if a father giveth land to his eldest son, to have and to hold to him and to the heirs male of his body begotten, the remainder to the second son, &c. if the eldest son alieneth in fee with warranty, &c. and hath issue female, and dieth without issue male, this is no collateral warranty to the second son, (49) for he shall not be barred of his action of formedon in the remainder, because the warranty descended to the daughter of the elder son, and not to the second son; for every warranty, which descends, descendeth to him that is heir to him who made the warranty, by the common law.

LITTLETON. [Sect. 718. 376 a.] secus in case of a gift in tail made to the eldest son, who dies, leaving a daughter.

(50) *NOTE, if land be given to a man and to the heirs male of his body begotten, and, for default of such issue the remainder thereof to his heirs female of his body begotten, and after the donee in tail maketh a feoffment in fee with warranty accordingly, and hath issue a son, and a daughter and dieth, this warranty is but a lineal warranty to the son to demand by a writ of formedon in the descender; and also it is but lineal to the daughter, to demand the same land by writ of formedon in the remainder, unless (τ 1)*

LITTLETON. [Sect. 719. 376 b.] On gift in tail to a man, remainder to his issue male, remainder to his issue female, the donee's warranty, on dis-

(46) &c. added in L. and M. and Roh.

(47) &c. added in L. and M. and Roh.

(48) &c. added in L. and M. and Roh.

(49) *car il ne serra barre—ne luy ledera,* L. and M. and Roh.

(50) *Nota—Item,* L. and M. and Roh.

(τ 1) The original is *sinon frere devist sans issue male*, which seems to be a misprint

continuing the entail, is lineal, and no bar to his son; or daughter: but the son's warranty to the discontinnee, is collateral, and a bar (at common law) to the daughter. (389)*

(51) *the brother dieth without issue male, because she claimeth as heir female of the body of her father engendered. But in this case, if her brother in his life release to the discontinnee, &c. with warranty, &c. and after dieth without issue, this is a collateral* warranty to the daughter, because she cannot convey to her the right which she hath by force of the remainder by any means of descent by her brother, (52) for that (53) the brother is collateral to the title of his sister, and therefore his warranty is collateral, &c.*

376 b.

(f) 24 E. 3.
36. 27 E. 3.
Age 108. 38
E. 3. 26. 40
E. 3. 9. 37 H.
8. Br. Noime
1 & 40 & tit.
Done & Rem.
61. (Ante,
17 b. 22 b.
2 Rol. Abr.
417. 1 Rol.
Abr. 627, 628.)

Here it appeareth, that (f) whensoever the ancestor taketh any estate of freehold, a limitation after in the same conveyance to any of his heirs, are words of limitation, and not of purchase, albeit in words it be limited by way of remainder (1) (v 1); and therefore here the remainder to the heirs female, vesteth in the tenant in tail himself.

LITTLETON.
[Sect. 720.
377 b.]

Gift in tail to eldest son, remainder to the second son, &c. on condition that if the eldest alien with warranty, &c. then to remain to the second son, is void. (9 Rep. 127.) (Powl. 43 a.)

ALSO, I have heard say, that in the time of king Richard the Second, there was a justice of the common place, dwelling in Kent, called Richel, who had issue divers sons, and his intent was, that his eldest son should have certain lands and tenements to him, and to the heirs of his body begotten; and for default of issue, the remainder to the second son, &c. and so to the third son, &c. and because he would that none of his sons should alien, or make warranty to bar or hurt the others that should be in the remainder, &c. he causeth an indenture to be made to this effect, viz. that the lands and tenements were given to his eldest son upon such condition, that if the eldest son alien in fee, or in fee tail, &c. or if any of his sons alien, &c. that then their estate should cease and be void, and that then the same lands and tenements immediately should remain to the second son, and to the heirs of his body begotten, (54) et sic ultra, the remainder to his other son, and livery of seisin was made accordingly.

LITTLETON.
[Sect. 721.
378 a.]

(290)*

*BUT it seemeth by reason, that all such remainders in the form aforesaid are void, and of no value, and that for three causes. One cause is, for that every remainer which beginning by a deed, it behoveth that the remainder be *in him to whom the remainder is intailed by force of the same deed, before the livery of seisin is made to him which shall have the freehold; for in such case the growing and the being of the remainder is by the livery of seisin to him that shall have the freehold, and such remainder was not to the second son at the time of the livery of seisin in the case aforesaid, &c.*

(51) *sinon*—si son, L. and M. Roh. Pin-
son, Redman, and MSS.

(52) *et*, added in L. and M. and Roh.

(53) *que*, not in L. and M. nor Roh.

(54) *ceo sur mesme condition, scilicet, que*

si le second fils alienast, &c. que adonques son estate cessera, et que adonques mesmes, les terres et tenements remaindront al tierce fils, et a les heires de son corps engendres, added in L. and M. and Roh.

for si non frere deviasi sans issue male (if her brother dieth without issue male), as it stands in the more correct edition. See n. (51) infra, and Vaugh. 368, 369.—[Ed.]

(1) See Mr. Butler's note at the end of the volume. (Note VIII.)

(v 1) See ante, p. 143. n. (p).—[Ed.]

Here our author is of opinion, that these remainders in the form
aforesaid, are void and of no value, for three causes : *378 a.

THE second cause is, if the first son alien the tenements in fee, then is the freehold and the fee-simple in the alienee, and in none other; and if the donor had any reversion, by such alienation the reversion is discontinued: then how by any reason may (55) it be, that such remainder shall commence his being and his growing immediately after such alienation made to a stranger, that hath by the same alienation a freehold and fee-simple, &c.? And also if such remainder should be good, then might he enter upon the alienee, where he had no manner of right before the alienation, which should be inconvenient. LITTLETON. [Sect. 722. 378 b.]

“Also, if such remainder should be good, &c.” The force of this argument is, that seeing the estate of the alienee (albeit the words of the condition be, that the state should cease and be void,) being an estate of inheritance in lands or tenements, cannot cease or be void before the state be defeated by entry; then if this remainder should be good, then must it give an entry upon the alienee to him that had no right before, which should be against the express rule of law, viz. that an entry cannot be given to a stranger to avoid a voidable act, as before hath been said in the Chapter of Conditions. 379 a. (Anie, 214 b. 218 a.)

“If the first son alien, &c.” By the alienation of the donee, two things are wrought: 378 b.

First, the frank-tenement and fee is in the alienee.

Secondly, the reversion is devested out of the donor. (g) And therefore by the alienation that transferreth the freehold* and fee-simple to the alienee, there can no remainder be raised and vested in the second son. (h) As if a man make a lease for life, upon condition that if the lessor grant over the reversion, that then the lessee shall have fee; if the lessor grant the reversion by fine, the lessee shall not have fee; for when the fine transferreth the fee to the conusee, it should be absurd, and repugnant to reason, that the same fine should work an estate in the lessee; for one alienation cannot vest an estate of one and the same land to two several persons at one time. (g) 21 H. 7. 11. 27 H. 8. 24. (291)* (h) 6 R. 2. quid juris clam. 20. Perk. sect. 729. fol. 275, 276. Dyer 209 a. Plowd. 457. Argumentum ex absurdo. (5 Rep. 8 a.)

In a man's own grant, which is ever taken most forcibly against himself, the reason of Littleton doth hold; for it hath been resolved by the justices, (i) that if a man seised of an advowson in fee by his deed granteth the next presentation to A., and, before the church becometh void, by another deed grant the next presentation of the same church to B., the second grant is void, for A. had the same granted to him before; and the grantee shall not have the second avoidance by construction, to have the next avoidance which the grantor might lawfully grant, for the grant of the next avoidance (i) 20 H. 8. Presentments ad Eccles. Br. 62. 33 H. 8. R. 53. 29 H. 8. Dier 25. 11 Eliz. 282. 282. (5 Rep. 66.)

(55) *cco*, not in L. and M. nor Roh.

(k) 15 H. 7.
19 E. 3. Quar.
Imp. 154.
3 Cro. 790.
791.)

*379 a.
(2 Cro. 691.
contra.
Winch. 94. a.
c. Hob. 120.
Ante, 189 a.)

doth not import the second presentation. (k) But if a man seised of an advowson *in fee take wife; now by act in law is the wife entitled to the third presentation, if the husband die before. The husband grant the third presentation to another, the husband die, the heir shall present twice, the wife shall have the third presentation, and the grantee the fourth; for in this case it shall be taken the third presentation, which he might lawfully grant; and so note a diversity between a title by act in law and by act of the party; for the act in law shall work no prejudice to the grantee.

LITTLETON.
[Sect. 723.
379 a.]

THE third cause is, when the condition is such, that if the elder son alien, &c. that his estate shall cease or be void, &c. then after such alienation, &c. may the donor enter by force of such condition (56), as it seemeth; and so the donor or his heirs in such case ought sooner to have the land than the second son, that had not any right before such alienation; and so it seemeth that such remainders in the case aforesaid are void (57).

(292)*
379 a.
(1 Rep. 48. 62.
120. 10 Rep.
36. 9 Rep.
127. 6 Rep.
40. 2 Rep.
50. Ante,
224 a.)
(1 Rol. Abr.
408.)

*Here it is to be observed, that part of the condition that prohibiteth the alienation made by tenant in tail is good in law, with such distinction as hath been before said in the Chapter of Conditions. And the consequent of the condition, viz. that the lands should remain to another, &c. is void in law, and, by the opinion of Littleton, the donor may re-enter for the condition broken; for *utile per inutile non vitiatur*: which, being in case of a condition for the defeating of an estate, is worthy of observation.

(10 Rep. 40 b.)

And it is to be noted, that, after the death of the donor, the condition descendeth to the eldest son, and consequently his alienation doth extinguish the same for ever; wherein the weakness of this invention appeareth: and therefore Littleton here saith, that it seemeth that the donor may re-enter, and speaketh nothing of his heirs. A man hath issue two sons, and maketh a gift in tail to the eldest, the remainder in fee to the puisne, upon condition, that the eldest shall not make any discontinuance with warranty to bar him in the remainder; and if he doth, that then the puisne son and his heirs shall re-enter; the eldest make a feoffment in fee with warranty, the father dieth, the eldest son dieth without issue, the puisne may enter; but if the discontinuance had been after the death of the father, the puisne could not have entered. In this case four points are to be observed. First, as Littleton here saith, the entry for the breach of the condition is given to the father, and not to the puisne son. 2dly, *That by the death of the father the condition descends to the elder son, and is but suspended, and is revived by the death of the eldest son without issue, and descendeth to the youngest son. 3dly, That the feoffment made in the life of the father cannot give away a condition that is collateral, as it may do a right. 4thly, That a warranty cannot bind a title of entry for a condition broken (as hath been said); but, if the discontinuance had been made after the death of the father, it had extinct the

(10 Rep. 109.)
*379 b.
41 E. 3. fol.

Vld. sect. 446.

(10 Rep. 96.)

(56) &c. added in L. and M. and Roh.

(57) &c. added in L. and M. and Roh.

condition : which case is put to open the reason of our author's opinion (1).

(1) In some of the former notes there has been found occasion to anticipate many of the observations which otherwise would have occurred upon this and the three preceding sections. See ante, 203. b. n. 1. 216. a. n. 2. 223, b. n. 1. and particularly 327. a. n. 2.—It may however be further observed, that this is one of the many attempts which have been made at different times, to prevent the exercise of that right of alienation which is inseparable from the estate of a tenant in tail. The chief of them are stated in a very pointed manner by Mr. Bowler, 1 Burr. 84. He observes, that the power to suffer a common recovery is a privilege inseparably incident to an estate tail: it is a potestas alienandi, which is not restrained by the statute *De donis*, and has been so considered ever since Taltanun's case. [12 E. 4. 14. 6. p. 16.] And this power to suffer a common recovery cannot be restrained by condition, alienation, custom, recognizance, statute, or covenant. That it cannot be restrained by condition, appears by Co. Litt. 223 b. 224 a. and Sunday's case, 9 Rep. 128.—That it cannot be restrained by limitation, appears by Cro. Jac. 696. *Poy v. Hinde*, and by Sunday's case, and other books.—That it cannot be restrained by custom, appears by the case of Taylor and Shaw, in Carter, 6, and 22.—That it cannot be restrained by recognizance, or by statute, appears by Pool's case, cited in Moore, 820.—That it cannot be restrained by covenant, appears by the case of *Collins v. Plummer*, 1 P. Wms. 104.—That an attempt to suffer a common recovery cannot be restrained, appears by Corbet's case, in the 2 Rep. 83 b. Sir Anthony Mildmay's case, in the 6 Rep. 40, and the case of *Pierce v. Win*, in 1 Ventr. 321. And that a conclusion or agreement to suffer a recovery, cannot be restrained, appears by Mary Portington's case, in the 10 Rep. 35.—One of the last attempts to establish a perpetuity was made in the will of John duke of Marlborough, where a power was given to trustees, on the birth of the sons of the several persons therein mentioned, to revoke the uses limited to those sons in tail male; and in lieu thereof, to limit the estates to the use of such sons for their lives, with immediate remainders to the respective sons of such sons severally, and successively in tail male. Lord Northington, in 1759, declared this clause, as it tended to a perpetuity and was repugnant to the estate limited, was void and of no effect. There was an appeal from this decree to the lords. And after hearing counsel upon it, the judges were ordered to attend, and their opinion was asked, "Whether by the rules of law an estate tail limited to the use of persons unborn by any deed or will, can, by virtue of any power given by such deed or will to trustees, be revoked upon the births of such persons, and a new estate limited to such persons for their lives respectively, with remainder to their issue successively in tail male." The lord chief justice of the Common Pleas delivered the unanimous opinion of the judges in the negative. The utmost stretch towards a perpetuity which the courts have hitherto allowed, is through the medium of an exercise of a power of appointment limited in a deed or will. If the objects of the power be not restrained to any particular description of persons, but designed generally to be such persons as the party to whom the power is given shall appoint, there is no question but he may appoint life estates, with remainders over, in the same manner as he might do by a substantive original conveyance, notwithstanding the persons to whom the life estates are appointed were not in existence at the time of the execution of the conveyance in which the power is contained. But it seems to be otherwise, if the objects of the power are restrained to any particular description of persons, as to the children of the appointer. See *Alexander v. Alexander*, 2 Ves. sen. 640. and *Robinson v. Hardcastle*, in Mr. Brown's reports of cases determined in Chancery, during the 26th year of his late majesty's reign. p. 22.—The modes formerly used to prevent the wife's dower seem open to objection. Sometimes the estate is limited to a purchaser and a trustee and their heirs, but as to the estate of the trustee and his heirs in trust for the purchaser and his heirs. This exposes the purchaser to the chance of the trustee's dying in his life; in which case the right of dower will attach upon the estate. Sometimes the estate is limited to the purchaser and a trustee, and the heirs of the trustee, but in trust for the purchaser. Sometimes it is limited immediately to the trustee and his heirs, in trust for the purchaser and his heirs; but each of these modes is objectionable, as they keep the legal fee from the purchaser, and expose him to all the inconvenience of its escheating to the crown for want of heirs of the trustees, or of its becoming vested in infants, married women, or persons residing at a distance, not easily discoverable, or not willing to join in the conveyances required to be made of it. Sometimes even it may be considered to pass in the general devise of the trustee's will, and by that means become settled at law to uses in strict settlement, and therefore not to be regained but by a fine or common recovery, and till the existence of a tenant in tail not to be regained without the aid of parliament. It cannot therefore be desirable that the legal

(293)* 377 b. 21 H. 6. fol. 33. Lib. 6. fol. 42 b. Sir Anthony Mildmay's case. (1 Rep. 84.) "I have heard say, &c." Those things that one hath by credible hearsay, by the example of our author, are worthy of observation. This invention, devised by justice Richel, in the reign of king Richard the Second, who was an Irishman born, and the like by Thirning, chief justice, in the reign of Henry the Fourth, were both full of imperfections; for *Nihil simul inventum est et perfectum*, and *Sæpe viatorem nova non vetus orbita fallit*: and therefore new inventions in assurances are dangerous. And hereby it may appear, that it is not safe for any man (be he never so learned) to be of counsel with himself in his own case, but to take advice of other great and learned men.

Non prosunt dominis, quæ prosunt omnibus, artes.

And the reason hereof is, *in suo quisque negotio hebetior est, quàm in alieno.*

(1) 2 H. 4. fol. 11. in Action mar le case.

(1) And the same judge, in his own name, &c. brought an action upon his case against others, and obtained a verdict so as the right of the cause was tried on his side; yet for that upon his own showing in his count the action did not lie, *ex assensu omnium justiciariorum præter querentem Richel*, judgment was given against him; but let us now leave this judge for example to others, and let us return to our author.

LITTLETON. [Sect. 724. 379 b.] (2 Inst. 283. cap. 3.)

ALSO, at the common law, before the statute of Gloucester, if tenant by the curtesy had aliened in fee with warranty (58), after his decease this was a bar to the heir (59), as it appeareth by the words of the same statute: but it is remedied by the same statute, that the warranty of tenant by the curtesy shall be no bar to the heir, unless that he hath assets by descent by the tenant by the curtesy; for before the said statute, this was a collateral warranty to the heir, for that he could not convey any title of descent to the tenements by *the tenant by the curtesy, but only by his mother, or other of his ancestors (60): and this is the cause why it was a collateral warranty.

380 a. Of this and the subsequent section sufficient hath been said before (11 H. 7. c. 20. ante, 365 b.) in this Chapter, sect. 697.

BUT if a man inheritor taketh wife, who have (61) issue a son between them, and the father dieth, *and the son entereth

(58) Accord. added in L. and M. and Roh.

(60) &c. added in L. and M. and Roh.

(59) &c. added in L. and M. and Roh.

(61) issue, added in L. and M. and Roh.

estate should be outstanding in a trustee. To prevent this, the estates may be first limited to such uses as the purchasers shall appoint, and for want of appointment, to the use of a trustee his heirs and assigns, during the life of the purchaser, in trust for him, and subject thereto to the use of the purchaser, his heirs and assigns. If this method be adopted, no doubt will remain of the wife's right of dower being effectually prevented: the purchaser during his life will have the absolute command of the legal fee, and at his death it will descend upon heir.—Another mode is suggested by Mr. Fearne, in his Essay on Contingent Remainders, 6 Edition, p. 347, note.—“The lands,” says he, “may be limited to the use of the appointees of the purchaser (in the fullest manner): and in default of appointment, to the use of him and his assigns during his life; and from and after the determination of that estate, by any means, in his life time, to the use of some person and his heirs, during the natural life of the purchaser, in trust for him and his assigns: and from and after the determination of the estate so limited in use to the said trustee and his heirs, to the use of the purchaser his heirs and assigns for ever.” [Butler, Note 330.]

into the land, and endow his mother, and after the mother alieneth that which she hath in dower, to another in fee, with warranty accordant, and after dieth, and the warranty descendeth to the son, now the son shall be barred to demand the same land by cause of the said warranty; because that such collateral warranty of tenant in dower is not remedied by any statute.

LITTLETON.
[Sect. 725.
379 b.]

"Is not remedied by any statute." But by a statute made since, this case is remedied, as you see before, sect. 697. 380 a.

THE same law is it where tenant for life maketh an alienation with warranty, &c. and dieth, and the warranty descendeth to him which hath the reversion or the remainder (62), they shall be barred by such warranty (63).

LITTLETON.
[Sect. 725.
379, b.]
Warranty of tenant for life, descending on remainderman, a collateral warranty and bar (at common law.)

*ALSO, in the case aforesaid, if it were so that when the tenant in dower aliened, (64) &c. his heir was within age, and also at that time that the warranty descended upon him he was within age: in this case the heir may after enter upon the alienee, notwithstanding the warranty descended, &c. because no laches shall be adjudged in the heir within age, that he did not enter upon the alienee in the life of tenant in dower. But if the heir were within age at the time of the alienation, &c. and after he cometh to full age in the life of tenant in dower, and so being of full age he doth not enter upon the alienee in the life of tenant in dower, and after *the tenant in dower dieth, &c. there peradventure the heir shall be barred by such warranty; because it shall be accounted his folly, that he being of full age did not enter in the life of tenant in dower, &c.*

LITTLETON.
[Sect. 726.
380 a.]
Warranty of tenant in dower no bar to the heir being within age at the fall of the warranty. Secus (at common law) if the heir came of age, and did not enter in the life of tenant in dower.

(65) But now by the statute made 11 H. 7. cap. 20. it is ordained, if any woman discontinue, alien, release, or confirm with warranty, any lands or tenements which she holdeth in dower for term of life, or in tail of the gift of her first husband, or of his ancestors, or of the gift of any other seised to the use of the first husband, or of his ancestors, that all such warranties, &c. shall be void; and that it shall be lawful for him which hath these lands or tenements, after the death of the same woman to enter.

(295)*
LITTLETON.
[Sect. 727.
381 a.]
(Ante, 62 b. Post, 35.)

This is an addition to Littleton, and therefore to be passed over. 381 a.

And hereof sufficient has been said before, sect. 697.

ALSO, if tenant in tail letteth the lands to a (66) man for term of life, the remainder to another in fee, and a collateral ancestor confirmeth the estate of the tenant for life, and bindeth him and his heirs to warranty for term of the life of the tenant for life and death, and the tenant in tail hath issue and dies; now the issue is barred to demand the tenements by writ of formedon during the life of tenant for life, because the collateral warranty (x 1) descendeth upon the issue in

LITTLETON.
[Sect. 738.
387 a.]
Warranty for term of life, a temporary bar only.

(62) &c. added in L. and M. and Roh.

(63) &c. added in L. and M. and Roh.

(64) &c. added in L. and M. and Roh.

(65) This sec. not in L. & M. nor Roh.

(66) *home*, not in L. and M. nor Roh.

tail. But after the decease of the tenant for life, the issue shall have a (67) writ of formedon, &c.

*387 b. *"A writ of formedon, &c."* Here is implied, that a collateral warranty giveth no right, *but shall bar only for life, and after the party is restored to his action.

It is also to be observed, that a warranty may descend to the heirs of him that made it during the life of another.

(296)* *By this section it appeareth, that a warranty may be raised by a confirmation which transferreth neither estate nor right, whereof sufficient hath been said before.

"To warranty for term of the life, &c." (m) This proveth that a warranty may be limited, and that a man may warrant lands, as well for term of life or in tail, as in fee (1).

If tenant in fee-simple that hath a warranty for life, either by an express warranty or by *dedi*, be impleaded and vouch, he shall recover a fee-simple, albeit his warranty were but for term of life, because the warranty extended in that case to the whole estate of the feoffee in fee-simple (2); but in the case that Littleton here putteth, the tenant for life shall recover in value but an estate for life, because the warranty doth extend to that estate only.

AND upon this I have heard a reason (here our student is taught, after the example of our author, to observe every thing that is worth the noting), *that this case will prove another case, viz. if a man letteth his lands to another, to have and to hold to him and to his heirs for term of another's life, and the lessee dieth living celuy a que vie, &c. and a stranger entereth into the land, that the heir of the lessee may put him out, (68) &c. because in the case next aforesaid, inasmuch as a man may bind him and his heirs to warranty to tenant for life only, during the life of the tenant for (69) life, and this warranty descendeth to the heir of him which made the warranty, the which warranty is no warranty of inheritance, but only for term of another's life: by the same reason where lands are let to a man, to have and to hold to him and *his heirs for term of another's life, if the (70) lessee die living celuy a que vie, his heirs shall have the lands living celuy a que vie, &c. For they have said, that if a man grant an annuity to another, to have and to take to him and his heirs for term of another's life, if the grantee die, &c. that after (71) his death his heir shall have the annuity during the life of celuy a que vie, &c. Quære de istâ materiâ.*

(67) *brief de*, not in L. and M. nor Roh.

(70) *lessee—pier*, L. and M. and Roh.

(68) *&c.* not in L. and M. nor Roh.

(71) *son mort*, not in L. and M. nor Roh.

(69) *terme*, not in L. and M. nor Roh.

(1) From this it appears, that the warranty ceases on the expiration of the estate to which it is annexed. In *Smith v. Tyndal*, Salk. 685, 686, it was resolved that no warranty extinguishes a right, but only binds or bars it so long as the warranty continues in force; for if the warranty be released, the ancient right revives. [*Butler*, Note 339.]

(2) Though the warranty be temporary, yet the thing warranted, and to be recovered is perpetual; for it is a warranty of a fee, though not a warranty in fee. Hob. 126. [*Powell*, Note 340.]

This case is without question, (n) that the heir of the lessee shall have the land to prevent an occupant. And so it is {as Littleton here saith} in case of an annuity, or of any other thing that lieth in grant, whereof there can be no occupant. And of this somewhat hath been said in the Chapter of Descents (A 2).

*WARRANTY that commences by disseisin (2), is in this manner: as where there is father and son, and the son purchaseth land, &c. and letteth the same land to his father for term of years, and the father by his deed thereof infeofeth another in fee, and binds him and his heirs to warranty, and the father dieth, whereby the warranty descendeth to the son, this warranty shall not bar the son; for notwithstanding this warranty the son may well enter into the land, or have an assise against the alienee if he will, because the warranty commenced by disseisin; for when the father, which had but an estate for term of years, made a feoffment in fee, this was a disseisin to the son of the freehold which then was in the son. In the same manner it is, if the son letteth to the father the land to hold at will, and after the father make a feoffment with warranty, &c. And as it is said of the father, so it may be said of every other ancestor, &c. In the same manner is it, if tenant by elegit, tenant by statute merchant, or tenant by statute staple, make a feoffment in fee *with warranty (72), this shall not bar the heir which ought to have the land, because such warranties commence by disseisin.*

*ALSO, if a guardian in chivalry, or guardian in socage make *a feoffment in fee, or in fee tail, or for life, with warranty, &c. such warranties are not bars to the heirs to whom the lands shall be descended, because they commence by disseisin.*

Here Littleton addeth the case of guardian in chivalry, and guardian in socage, and guardian because nurture is also in the same case.

ALSO, if father and son purchase certain lands or tenements, to have and to hold to them jointly, &c. and after the father alien (73) the whole to another, and bind him and his heirs to warranty, &c. and after the father dieth, this warranty shall not bar the son of the moiety that belongs to him of the said lands or tenements, because as to that moiety which belongs to the son, the warranty commences by disseisin, &c.

"To have and to hold to them jointly, &c." This is to be intended of a joint purchase in fee; for if the purchase were to the father and

(72) &c. added in L. and M. and Roh.

(73) *Pentier—Pentiertie, L. & M. & Roh.*

(A 2) See ante, 41 b. vol. 1. p. 625—627. and the notes there.—[Ed.]

(3) As to *warranties commencing by disseisin*:—Lord Chief Baron Gilbert divides warranties into two sorts; first, those commencing by disseisin or wrong; secondly, binding warranties. The first are where the ancestor that makes the warranty is partner to the wrong; and such warranties are not obliging, because it cannot be presumed that one who is so unjust as to do wrong, will be so just as to leave a recompense to his heir; wherefore such contracts are wholly rejected as collusive, and founded on no consideration. In the *ancien Coutumier de Normandie*, ch. 96. it is said, that in a writ of *nouvelle disseisin*, there is no vouching to warranty: because it is not to be suffered that any one should retain the possession of another either by himself, or by the means of another, or that he should disturb it by his foolish hardihood; and whoever does so ought to restore it.—[Butler, n. 316.]

388 a.

(n) 17 E. 3. 48.
18 E. 3. 12.
11 H. 4. 42.
7 H. 4. 46.
8 H. 4. 15.
Dy. 8. El 253.
18 H. 8. 3.
27 H. 8. 21.
H. 8. tit. Es-
tat. Br. 50.
19 E. 3. tit.
Account 56.
33 Ass. p. 17.
22 H. 6. 33.
39 E. 3. 37.
Vid. sect. 337.
(Anie, 41 b.)
LITTLETON.
[Sect. 698.
366 b.]
5. Warranty
by disseisin.

(298)*

LITTLETON.
[Sect. 699.
367 a.]
*367 b.
367 b.
16 E. 3. Garr.
20. 8 Ass. 2.
43 E. 3. 7.
and the
books above-
said. Vid.
sect. 698.
(3 Rep. 7.)
LITTLETON.
[Sect. 700.
367 b.]

367 b.

13 Ass. 8. 13
E. 3. Garr.

24, 25, 37.
23 H. 6. 51.
8 H. 7. 6.
(5 Rep. 79.)

(Post, 393 a.)

(1 Rep. 66.)

(299)*
(F.N.B.192a.)

the son, and the heirs of the son, and the father maketh a feoffment in fee with warranty, if the son entereth in the life of the father (c 2), and the feoffee re-enter, the father dieth, the son shall have an assise of the whole: and so is the book of 2 H. 6. to be understood. But if the son had not entered in the life of the father, then for the father's moiety it had been a bar to the son (d 2), for that therein he had an estate for life; and therefore the warranty as to that moiety had been collateral to the son, and by disseisin for the son's moiety; and so a warranty defeated in part, and stand good in part. And this appeareth by the example that Littleton hath put. But if the purchase had been to the father and son, and to the heirs of the father, then the entry of the son in the life of the father, as to *the avoidance of the warranty, had not availed him, because his father lawfully conveyed away his moiety* (1).

LITTLETON.
[Sect. 701.
368 a.]

ALSO, if A. of B. be seised of a mese, and F. of G. that no right hath to enter into the same mese, claiming the said mese, to hold to him and to his heirs, entereth into the said mese, but the same A. of B. is then continually abiding in the same mese: in this case the possession of the freehold shall be always adjudged in A. of B. and not in F. of G., because in such case where two be in one house, or other tenements, and the one claimeth by one title, and the other by another title, the law shall adjudge him in possession that hath right to have the possession of the same tenements. But if, in the case aforesaid, the said F. of G. make a feoffment to certain barretors and extortioners in the country, to have maintenance from them of the said house, by a deed of feoffment with warranty, by force whereof the said A. of B. dare not abide in the house, but (74) goeth out of the same, this warranty commenceth by disseisin, because such feoffment was the cause that the said A. of B. relinquished the possession of the same house (75).

368 a.
(Ante, 194 a.
Post, 244 a.
Rol. Abr. 661,
662. Plowd.
239 b.) 19 H.
6. 40. 25 b.
per Newton.
(Siderf. 335 a.
Ante, 180 b.
181 a.)
(o) 17 E. 3. 69.
11 Ass. p. 23.
(Perk. 84. 8
Rep. 101 b.
Hob. 130.
Ante, 189.
Post, 244. 10
Rep. Lam-
pet's case.)

"Where two be in one house, &c. and the one claimeth by one title, and the other by another title, &c. For the rule is, Duo non possunt in solido unam rem possidere.

These words of our author be significant and material: (o) for if a man hath issue two daughters, bastard eigne and mulier puisne, and die seised, and they both enter generally, the sole possession shall not be adjudged only in the mulier, because they both claim by one and the same title: and not one by one title, and the other by another title, as our author here saith.

(74) *se en*, added in L. and M. and Roh.

(75) *&c.* added in L. and M. and Roh.

(c 2) *i. e.* for the forfeiture.—[Ed.]

(d 2) That is, at common law, before the 4 and 5 Ann. c. 16.—[Ed.]

(1) It is greatly to be regretted, that Sir Edward Coke has not expressed himself more fully on the subject hinted at by him in this note, the defeating of the warranty by the heir's entry or claim, in the ancestor's life-time. It is thus mentioned by Chief Baron Gilbert, Ten. 135. The heir was presumed to receive a recompense, and therefore was barred if he did not claim during the life-time of his ancestor; and this was the more reasonable, because such recompenses were anciently in lands, which did of right descend to the heir; and if the ancestor did alien them, the heir must claim his own during the life of his ancestor, otherwise he could never claim it, inasmuch as this was the whole time of limitation for the heir to challenge his own in this case; and if he slipped the time, he was barred for ever, inasmuch as there might be secret conveyances to alien the recompense for the benefit of the heir, which might turn to the prejudice of the purchaser. [Butler, Note 318.]

(p) If the tenant in an assise of a house desire the plaintiff to dine with him in the house, which the plaintiff doth accordingly, and so they be both in the house; and in truth one pretendeth one title, and the other another title; yet the law in this case shall not adjudge the possession in him that right hath; because our author here saith, he claimed not his right, and it should be to his prejudice if the law should adjudge him possession: and a trespasser he cannot be, because he was invited by the tenant in the assise.

(p) Pl. Com. 31. the Par- son of Honey- lane's case. (Post. 245 b. Flow. 2 a. b.) (300)*

“*Relinquished the possession, &c.*” This must be understood, that, before livery of seisin upon the feoffment, A. of B. departed out of the house; for otherwise the livery and seisin should be void, because A. of B. was in possession. And Littleton here saith, *by a deed of feoffment*, so as albeit the deed were made before the departure it is not material; but the departure must be before the livery of seisin, for that doth work the disseisin. And yet that which Littleton saith is true, that the feoffment was the cause that he relinquished his possession; for otherwise he would not have done it.

369 b. (2 Rep. 31. Ante 26 b.)

But admit that A. of B. had departed for any other cause, yet if F. of G. enter and infeoff certain barretors or extortioners, or any other, with warranty, this is a warranty that commenceth by disseisin, for that the feoffment worketh a disseisin.

Here in this case that Littleton putteth, the feoffment is void by the statute (q) of 1 R. 2; for thereby it is enacted, that feoffments made for maintenance shall be holden for none, and of no value, so as Littleton putteth his case at the common law; for he seemeth to allow the feoffment, where he saith, *such feoffment was the cause, &c.*: but some have said that the feoffment is not void between the feoffor and feoffee, but to him that right hath.

369 a. (q) 1 R. 2. cap. 9. Vid. 27 H. 2. fol. 22.

And here barretors and extortioners are put but for examples; for if the feoffment be made to any other person or persons, the law is all one.

368 b.

ALSO, if a man which hath no right to enter into other tenements, enter into the same tenements, and incontinently* make a feoffment thereof to others by his deed with warranty, and deliver to them seisin, this warranty commenceth by disseisin, because the disseisin and feoffment were made as it were at one time. And that this is law, you may see in a plea (76) M. 11 E. 3. in a writ of formedon in the reverter.

LITTLETON. [Sect. 702. 369 b.] (301)*

“*Mich. 11 E. 3.*” This is mistaken, and should be (r) 31 E. 3. and so is the original, which case you shall see in Master Fitzherbert’s Abridgment, for there is no book at large of that year. Hereby you may perceive that learned men look not only to the cases reported, but unto records, as you may see Littleton did; for

370 a. (r) 31 E. 3. 11. Garr. 28.

Fitzherbert put this case in print long after, as elsewhere hath been showed.

369 b.
See before in
the Chapter
of Releases.
(5 Rep. 79.)
46 E. 3. 6.

This action doth explain that which hath been said before. And albeit Littleton used the words (*and incontinently thereof make a feoffment*); and that in this case of Littleton the disseisin and feoffment were made (*quasi uno tempore*); yet if the disseisin were made to the intent to make a feoffment with warranty, albeit the feoffment be long after, this is a warranty *that commenceth by disseisin.

366 b.
Why so call-
ed.
(Dr. & Stud.
155 a. b.)

"*Warranty that commences by disseisin, &c.*" It is called a warranty that commenceth by disseisin, because regularly the conveyance, whereunto the warranty is annexed, doth work a disseisin.

7 E. 3. 41.
48 E. 3. 17.
30 E. 3. 12.
Vid. sect. 611.
(2 Inst. 154.)
1 Rol. Abr.
663. 3 Rep.
37.)

In section 698, Littleton putteth five examples of a warranty commencing by disseisin, viz. of a feoffment made with warranty by tenant for years, by tenant at will, by tenant by *elegit*, by tenant by statute merchant, and by tenant by statute staple: all these, and the other examples that Littleton putteth of this kind of warranties in the succeeding sections, have four qualities.

Its qualities:

That the disseisin be done immediately to the heir.
Lib. 5. fol. 79 b.
Fitzherbert's case. (Cro. Car. 483.)
(2 Rol. Abr. 741.)
(302)*
Exceptions to this rule; in respect of fraud, &c.
31 E. 3. tit. Carr. 28.
(6 Rep. 50 a.)
(2 Rol. Abr. 772, 773.)
Ante, 32 a.
56 a. 171 a.
179 a. F. N. B. 140 c.)

First, that the disseisin is done immediately to the heir that is to be bound; and yet if the father be tenant for life, the remainder to the son in fee, the father by covin and consent *maketh a lease for years, to the end that the lessee shall make a feoffment in fee, to whom the father shall release with warranty, and all is executed accordingly, the father dieth, this warranty shall not bind, albeit the disseisin was not done immediately to the son; for the feoffment of the lessee is a disseisin to the father, who is *particeps criminis*. So it is, if one brother make a gift in tail to another, and the uncle disseise the donee, and infeoffeth another with warranty, the uncle dieth, and the warranty descendeth upon the donor, and then the donee dieth without *issue, albeit the disseisin was done to the donee and not to the donor, yet the warranty shall not bind him. The father, the son, and a third person are joint-tenants in fee, the father maketh a feoffment in fee of the whole with warranty, and dieth, the son dieth, the third person shall not only avoid the feoffment for his own part, but also for the part of the son; and he shall take advantage that the warranty commenced by disseisin, though the disseisin was done to another.

That the warranty and disseisin be simultaneous.
(Cro. Car. 483.)

(e) 19 H. 8. 12.
Lib. 5. fol. 79 b.
Fitzh. case.
Exceptions to this rule; as where the disseisin is done with intent to make a future feoffment with warranty, &c.

The second quality appearing in Littleton's examples is, that the warranty and disseisin are *simul et semel*, both at one and the same time. (s) And yet, if a man commit a disseisin of intent to make a feoffment in fee with warranty, albeit he make the feoffment many years after the disseisin, notwithstanding, because the warranty was done to that intent and purpose, the law shall adjudge upon the whole matter, and by the intent couple the disseisin and the warranty together.

(Plowd. 51 a. 3 Rep. 78. Ante, 369 a.
371 a. 9 Rep. 81 a. Post, 314 b. 5 Rep. 78.)

The third quality is, that the warranty that commenceth by disseisin by all these examples (if it should bind) should bind as a collateral warranty, and therefore commencing by disseisin shall not bind at all.

That it be in nature of collateral warranty.

The fourth quality is a disseisin ; but that is put for an example ; and the rather, for that it is most usual and frequent ; but a warranty that commenceth by abatement or intrusion (that is, when the abatement or intrusion is made of intent to make a feoffment in fee with warranty), shall not bind the right heir, no more than a warranty that commenceth by disseisin, because all do commence by wrong. And so it is, if *the tenant dieth without heir, and an ancestor of the lord enter before entry of the lord, and make a feoffment in fee with warranty, and dieth, this warranty shall not bind the lord, because it commenceth by wrong, being in nature of an abatement. *Et sic de similibus* (r 2).

That there be a disseisin or abatement, &c. (10 Rep. 95. 2 Rol. Abr. 740.)

(303)*

“ *Shall not bar the heir, &c.*” For, by the authority of our author himself, a lessee for years may make a feoffment, and by his feoffment a fee-simple shall pass ; so as albeit as to the lessor it worketh by disseisin, yet between the parties the warranty annexed to such estate standeth good ; upon which the feoffee may vouch the feoffor or his heirs, as by force of a lineal warranty. And therefore if a lessee for years, or tenant by *elegit*, &c. or a disseisor incontinent make a feoffment in fee with warranty, if the feoffee be impleaded, he shall vouch the feoffor, and after him his heir also ; because this is a covenant real, which bind him and his heirs to recompense in value, if they have assets by descent to recompense ; for there is a feoffment *de facto*, and a feoffment *de jure* : (*) and a feoffment *de facto* made by them that have such interest or possession as is aforesaid, is good between the parties, and against all men, but only against him that hath right. And therefore if the lord be guardian of the land, or if the tenant maketh a lease to the lord for years, or if the lord be tenant by statute merchant, or staple, or by *elegit* of the tenancy, and make a feoffment in fee, he hereby doth extinguish his seignory, although, having regard to the lessor, it is a disseisin.

Warranty by disseisin binding between the parties, though not as to those that have right. (1 Leon. 204. 305. Cro. Car. 388.) Vid. sect. 611. 609. Bract. fol. 216. 223. 224. Fleta, lib. 4. cap. 17. 1. 2. Britton, cap. Disseisin. 50 E. 3. 12 b. 8 H. 7. 5. 7 E. 3. 11. 14 E. 3. Feoffments et Falses 67. 18 E. 3. Issue 36. 4 E. 2. Briefs 730. 19 E. 2. Ass. 400. 42 E. 3. 7. 17 E. 3. 41. 43 E. 3. Dis. 5. 3 E. 4. 17. 12 E. 4. 12. 10 E. 4. 18. F. N. B. 201. Lib. 3. fol. 78. in Fernor's case.

(*) Temps E. 1. Counterplea de Voucher. 126. 50 E. 3. Ibid. 124. Vid. W. 1. cap. 43. in the second part of the Institutes.

Rebouter, is a French word, and is in Latin *repellere*, to repel or bar ; that is, in the understanding of the common law, the action of the heir by the warranty of his ancestor ; and this is called to rebut or repel (a 2).

365 a. 6. What use may be made of a warranty. Rebutter. (Post 303 b. 2 Rol. Abr. 775, 776. Cro. Jac. 4.)

(r 2) As to the distinction between actual disseisin and disseisin by election, see the notes to Chap. 47. Of Injuries to real Property.—[*Ed.*]

(a 2) Where a lineal or collateral warranty is a bar, there if the party be impleaded by him who made the warranty, or his heirs, the party impleaded, who is tenant of the land, may plead and show forth his warranty against him, and demand judgment, whether, contrary to his own warranty, he shall be received to demand the thing warranted ; and this in pleading is called a *rebutter*. Terms de la Ley, tit. Garranty.

But, if the party be impleaded or sued by *another* for the land in an action wherein he

- (304)* **Voucher*, (in Latin *vocatio*, or *advocatio*) is a word of art, made of the verb *voco*, and is in (t) the understanding of the common law, when the tenant calleth another into the court that is bound to him to warranty, that is, either to defend the right against the demandant, or to yield him other land, &c. in value, and extendeth to lands or tenements of an estate of freehold or inheritance, and not to any chattel *real, personal, or mixed, saving only in case of a wardship granted with warranty (H 2); for, in the other

may vouch, then he to whom the warranty is made or his heirs may *vouch*, that is, call in the warrantor or his heirs to warrant the land. And this is an interpleader in the nature of an action brought by the warrantor against the warrantee, wherein he that vouches, who is called the voucher, is demandant; and he that is vouched, who is called the vouchee, is made tenant or defendant to the action, and the voucher is as it were out of the suit; and this second tenant, the vouchee, is called the tenant by the warranty; and hereupon a writ issues to the sheriff, to summon the vouchee to appear, which writ is called a *summonas ad warrantizandum*. Infra, 101 b. 393 a. If the vouchee appears, he must plead to the voucher: and if he shows cause why he should not warrant, that must be tried; and this showing of cause is called a counterplea to the voucher. But if he pleads in avoidance of the warranty, it is called a counterplea to the warranty: and if he cannot defend himself against the warranty, the stranger shall recover the land demanded against the voucher, and he shall recover as much other land against the vouchee of the lands he has or had at the time of the voucher: and this recovery of other lands is called a recovery in value. If the vouchee at the time of the voucher and recovery has no lands descended to him to answer the warranty, but has afterwards lands falling to him by descent from that ancestor, then the voucher may have a re-summons, and recover the land which afterwards falls. But if the sheriff returns upon the summons that the vouchee is summoned, and he nevertheless makes default, then he shall have a *magnum cape ad valentiam*; when if he makes default again, the judgment shall be given against the voucher, and he shall recover over the value against the vouchee: and if the vouchee appears and then makes default, the voucher shall have a *parvum cape ad valentiam*; and then if he makes default, judgment shall be given as before. But if the sheriff upon the summons returns that he has nothing whereby he may be summoned, then, after writs of *alias* and *pluries*, a writ called *sequatur sub suo periculo* (because the tenant shall lose his land without any recompense in value, unless he upon that writ can bring in the vouchee to warrant the land unto him) shall be awarded; and if the like return be made, the demandant shall have judgment against the first tenant, but he cannot recover in value against the vouchee, because he was never warned, and it appears that he has nothing. If the vouchee had a warranty from some other for the land, he may *deraign*, that is, maintain the warranty over, and shall recover in value also against his vouchee in the same manner as before. If the warrantee to whom the warranty is made, or his heirs, be impleaded in any action in which he may vouch, then he ought to vouch to warranty; and if he will not, then he shall not afterwards have a writ of *warrantia chartæ*.

But if the warrantee or his heirs be impleaded in an assise, or in a writ of entry in the nature of an assise, in which actions they cannot vouch, then they shall have a writ of *warrantia chartæ* against the warrantor, who made the warranty, or his heirs. F. N. B. 34. Likewise, the warrantee or his heirs may, at any time before they be impleaded for the land, bring a *warrantia chartæ* upon the warranty in the deed against the warrantor or his heirs, and thereby all the land the heir of the warrantor has by descent from the ancestor, who made the warranty, at the time of the writ brought, shall be bound and charged with the warranty into whose hands soever it afterwards goes. So, if the land warranted be afterwards recovered from the warrantee, he shall have so much land over again of the other land of the heir of the warrantor, or of the warrantor himself, if he be living: and although the warrantee or his heirs recover in this writ, yet upon occasion he may notwithstanding afterwards vouch the warrantor or his heirs. And Lord Coke hereafter observes, that it is advisable to bring this writ of *warrantia chartæ* betimes, because it binds all the lands of the warrantor from the time of the writ brought, but it does not bind any land which he had previously aliened. Post, 101 b. 393 a. Et vid. ante, p. 246. n. (A).—[Ed.]

(H 2) For in a writ of ward, though a chattel were only demanded, yet the tenure of the inheritance, which is in the realty, was the ground of the action. Hawk. Abr. 155.—[Ed.]

cases concerning chattels, the party, if he hath a warranty, shall not vouch, but have his action of covenant, if he hath a deed, or if it be by parol then an action upon his case, or an action of deceit, as the case shall require. Now seeing that one Latin, French, or English word, can have this particular signification, therefore the common lawyer (that I may speak once for all) is driven, as the professors of other liberal sciences use to do, to use significant words framed by art, which are called *vocabula artis*, though they be not proper to any language. He that voucheth is called the voucher, *vocans*, and he that is vouched is called vouchee, *warrantatus*. (u) The process whereby the vouchee is called, is a *summons ad warrantizandum*, whereupon, if the sheriff returneth that the vouchee is summoned, and he make default, then a (w) *magnum cape ad valentiam* is awarded; when if he make default again, then judgment is given against the tenant, and he over to have in value against the vouchee. If the vouchee do appear, and after make default, then *parvum cape ad valentiam* is awarded; and if he make default again, then judgment as before. But if the sheriff return, that the vouchee hath nothing, then after writs of *alias* and *pluries*, a writ of *sequatur sub suo periculo* shall be awarded; and if the like return be made, then shall the demandant have judgment against the tenant; but he shall not have judgment to recover in value, because the vouchee was never warned, and it appeareth that he hath nothing. But in the grand *cape ad valentiam* it appeareth that he hath assets, and his making default after summons is an implied confession of the warranty. And as it is called a *sequatur sub suo periculo*, because the tenant shall lose his land without any recompense in value, unless he upon that writ can bring in the vouchee to warrant the land unto him; and if, at the *sequatur sub suo periculo*, the tenant and the vouchee make default, and the demandant hath judgment against the tenant, and after brings a *scire facias* to have execution, the tenant may have a *warrantia cartæ*, and if he were impleaded by a stranger, he may vouch again; but if he had judgment to recover in value, he shall never have a *warrantia cartæ*, or vouch again (12), for by this judgment to recover in value he hath benefit of the warranty. And you shall find in books a recovery with a single voucher, and that is when there is but one voucher; and with a double voucher, and that is when the vouchee voucheth over; and so a treble voucher, &c. Again, you shall find there also a foreign voucher; and that is when the tenant being impleaded within a particular jurisdiction (as in London, or the like) voucheth one to warranty, and prays that he may be summoned in some other county out of the jurisdiction of that court. This is called a foreign voucher, but might more aptly be called a voucher of a foreigner, *de forinsecis vocatis ad warrantizandum*.

This is evident and worthy of diligent observation, viz. that the lands of the vouchee shall be liable to the warranty, that the vouchee

24, 25, 26, &c.
optime Lamb.
Expl. Verb.
Advocare.
(Ante, 365 a.
359. Hob. 2.
28. Noy. 131.
2 Rol. Abr.
733.)
Proceedings
thereon.
(Cro. Jam.
307.)

(u) V. Reg.
Jud. for all
these judicial
writs.

(w) V. Vet.
N. B. 179.
186. 30 E. 3.
28. 14 H. 6. 7.
17 E. 3. 41.
3 H. 4. 4.
11 H. 4. 72.
45 E. 3. 19.
F. N. B. 124.
135. (Post,
393 a.)

*102 a.

(Post, 393.)

Warrantia
cartæ.

Glouc. ca. 12.
F. N. B. 6 c.

Lands in the
possession of
vouchee at

(12) That is, if by such judgment he had full benefit of the warranty. Infra, 393 a.—
[Ed.]

the time of
voucher,
liable;
29 E. 3. 3.
18 E. 3. 1.
2 H. 4. 10.
23 E. 3. Re-
cov. in value
3. or, in war-
rantia cartæ,
at the time
of writ
brought.
16 E. 3.
Vouch. 85.
19 Edw. 3.
Vouch. 24.
22 E. 3. Fitz.
Nat. Bro. 134 f.
(x) 2 H. 4. 14.
42 E. 3. 1.
42 Ass. 17.
9 E. 2. th.
Execut. 249.
(1 Rol. Abr.
890, 891, 892.)
* 102 b.
(y) 22 Ass.
pl. 32. (Finch.
L. 353.)
(307)*

hath at the time of the voucher; for that the voucher is in lieu of an action; and in a *warrantia cartæ*, the land which the defendant hath at the time of the writ brought, shall be liable to the warranty.

Upon a judgment in debt, the plaintiff (x) shall not have execution but only of that land which the defendant had at the time of the judgment; for that the action was brought in respect of the person, and not in respect of the land. But if an action of debt be brought *against the heir, and he alieneth hanging the writ, yet shall the land, which he had at the time of the original purchase, be charged; for that the action was brought against the heir in respect of the land. (y) If a man be nonsuit, the land only which he had at the time of the amerciamment assessed shall be charged, and not that which he had at the finding of the pledges. For the amerciamment is not in respect of the land, but of his want of prosecution, which was a default in his person. But the issues of a juror shall be levied upon the feoffee, albeit they *were not lost before the feoffment; because he was returned and sworn in respect of the land (x 2). Note the diversity.

Lands specially bound
not liable unless in the
vouchee's
possession at the time of voucher: secus as to his person. 32 E. 1. Voucher 292. (2 Rol. Abr. 771.)

If a man give lands in fee with warranty, and bind certain lands specially to warranty, the person of the feoffor is hereby bound, and not the land, unless he hath it at the time of the voucher.

384 b.

7. Who may
take advantage of a
warranty, and
against
whom.

And seeing somewhat hath been said out of Bracton and other ancient authors, concerning assignees, it is necessary to show who shall take advantage of a warranty, as assignee by way of voucher, to have recompense in value (L 2).

Warranty to
two, their
heirs and
assigns, the
assignee of
the heir of
one may
vouch.
(z) 14 E. 3.
Garr. 33.
13 E. 1.
Garr. 33.
Ll. 5. fol. 17 b.
in Spencer's
case. 36 E. 3.
21.

(z) If a man infeoff A. and B. to have and to hold to them and to their heirs, with a clause of warranty, *prædictis A. et B. et eorum hæredibus et assignatis*: in this case if A. dieth, and B. surviveth, and dieth, and the heir of B. infeoffeth C., he shall vouch as assignee, and yet he is but the assignee of the heir of one of them; for in judgment of law the assignee of the heir is the assignee of the ancestor, and so the assignee of the assignee shall vouch *in infinitum*, within these words (his assigns).

(x 2) And in the case of the juror the land is charged with the issues by the sheriff's return, and cannot be discharged but by the appearance of the tenant. Hawk. Abr. 157, 158.—[Ed.]

(L 2) With respect to the parties who may take advantage of a warranty, it is observable, that all such as are parties to the warranty, that is, such as are named in the deed, shall take advantage of the warranty; as if one warrants lands to another, his heirs, and assigns; in this case both the heirs and assigns may take advantage of it, and they may both vouch and rebut, or have a *warrantia cartæ*, so as they come in in privity of estate; for otherwise the heirs or assigns cannot vouch, or have a *warrantia cartæ*, though they may, in many cases, rebut by force of the warranty, as a thing annexed to the land. *Spencer's case*, 5 Co. 71. *Infra*, 385 a.—But where he that would rebut claims above the warranty, there he shall not be allowed to rebut. *Lincoln College case*, 3 Co. 62, 63.—[Ed.]

(a) If a man infeoffeth A. to have and to hold to him, his heirs and assigns; A. infeoffeth B. and his heirs, B. dieth, the heir of B. shall vouch as assignee to A. : so as heirs of assignees, and assignees of assigns, and assignees of heirs, are within this word (assigns); which seemed to be a question in Bracton's time. And the assignee shall not only vouch, but also have a *warrantia cartæ*.

Warranty to a man, his heirs and assigns, the assignee's heir may vouch. (a) 12 E. 2. Vouch. 263. 19 E. 2. Garr. 65. 13 E. 1. Ib. 93. Lib. 5. Bracton, ubi supra. F. N. B. 135.

fol. 17. Spencer's case. 7 E. 3. 34. 19 E. 3. 9. 14 E. 3. Garr. 33. 9 E. 2. Garr. de Chart. 30. 36 E. 3. Garr. 1. 4 H. 8. Dyer 1. F. N. B. 135.

*If a man doth warrant land to another without this word (heirs), his heirs shall not vouch (m); and regularly if he warrant land to a man and his heirs, without naming assigns, his assignee shall not vouch. (b) But if the father be infeoffed with warranty to him and his heirs, the father infeoffeth his eldest son with warranty, and dieth, the law giveth to the son advantage of the warranty made to his father, because by act in law the warranty between the father and the son is extinct.

(308)* Heirs not being named in warranty cannot vouch; nor assigns not being named. Exception to this rule by act of law. (b) 43 E. 3. 23. 26 E. 3. 68. (Ante, 174 a. b. Fl. Com. 418.

Post, 380 a.) 40 E. 3. 14. 24 E. 3. 36. 11 H. 4. 94. 39 E. 2. 17. 5 E. 3. Age 19.

But note, there is a diversity between a warranty that is a covenant real, which bindeth the party to yield lands or tenements in recompense, and a covenant annexed to the land, which is to yield but damages, for that a covenant is in many cases extended further than the warranty. As for example :

Diversity herein between a warranty and a covenant real annexed to land, which yields but damages.

(c) It hath been adjudged, that where two coparceners made partition of land, and the one made a covenant with the other, to acquit her and her heirs of a suit that issued out of the land, the covenantee aliened, in that case the assignee shall have an action of covenant, and yet he was a stranger to the covenant, because the acquittal did run with the land (m 2)

(c) 42 E. 3b. per Finchden. *385 a. (5 Rep. 18 a. in Spencer's case.)

(m) The doctrine in the text was discussed in the recent case of *Doe v. Prestwidge*, 4 *Mauk and Schwin*, 178. [Note from the 18th Lond. edit. 1823.]

(m 2) See acc. *Spencer's case*, 5 Co. 16. *Bally v. Wells*, 3 Wils. 25. *Tatem v. Chapkin*, 2 H. Bl. 133. So, where in a lease for years, the lessee covenanted with the lessor, his executors and administrators, to repair; and the lessor died; it was held, that his heir might bring an action on the covenant: for it was annexed to the land, and went to the heir, though he was not named. *Laugher v. Williams*, 2 Lev. 92. But, where the lessor was only tenant for life, it was held, that his heir was not entitled to the benefit of covenants made with him: because the lease determined by his death. *Bradnell v. Roberts*, 2 Wils. 143.

On a covenant for further assurance, where the breach happened in the life of the covenantee, but the damage accrued to the heir; the heir has a preferable title to the executor, to bring the action of covenant. *King v. Jones*, 1 Marsh. 107. 5 Taunt. 418. 4 Maul. & S. 188. And where the plaintiff as executrix declared that the defendant by deed conveying to plaintiff's testator certain land in fee, subject to redemption on payment of a sum certain, covenanted with the testator, his heirs and assigns, that he was at the time of the execution of the deed seised in fee, and had a right to convey, &c. and assigned for breach that the defendant was not seised, &c. and had not a right to convey, &c. it was held, that the executrix could not maintain this action without showing some special damage to the testator in his life-time, or that the plaintiff claimed some interest in the premises. *Kingdon v. Nottle*, 1 Maul. & S. 355. But the plaintiff being devisee in fee, sued afterwards in that character, stating as damage, that the premises were thereby of much less value than they would have been, and that she had been prevented from selling them at so large a

(309)*
(d) 42 E. 3. 2a.
Laur. Faken-
ham's case.
2 H. 4. 6.
6 H. 4. 1. & 2.
Ralfie Brab-
son's case.
Lib. 5. fol. 17.
18. Spencer's
case.

(e) 2 H. 4. 6.
Hen. Horne's
case. 6 H. 4.
1. Lib. 5. fol.
17, 18. Spen-
cer's case.

Assignee of
part of the
land may
vouch:

(*) 18 E. 3. 52.
10 E. 3. 58.
5 E. 3. 40.
12 E. 3. Coun-
terplea de
Vouch. 42.
14 E. 3.
Vouch. 108.
5 E. 3. Ibid.
178.

secus as to
assignee of
part of the
estate in the
land:

13 E. 3. Ibid.
159. 40 E. 3.
22. 41 E. 3.
Vouch. 69 &
100. 32 E. 3.
Ibid. 94.
(Hob. 36.)
unless the
whole estate
be out of the
lessor.

And this di-
versity was
agreed, Hil.
14 Eliz. in
Communi
Banco, which
I heard and
observed.

(f) 40 E. 3.
14. 40 Ass. 5.
33 H. 8. 4.
37 H. 8.

Alienation
sans license
31. 8 H. 4. 8.

(310)*
(g) 11 R. 2.
Deth. 46.
7 E. 3. 36.
46 E. 3. 4.
Persons not
privy in es-
tate may re-
but, but not
vouch:

(See Vaugh.
353.)

so as to as-
signs not
named in the
warranty;
or persons in

*(d) A. seised of the manor of D. whereof a chapel was parcel, a prior with the assent of his convent covenanteth by deed indented with A. and his heirs to celebrate divine service in his said chapel weekly, for the lord of the said manor, and his servants, &c. In this case the assignees shall have an action of covenant, albeit they were not named, for that the remedy by covenant doth run with the land, to give damages to the party grieved, and was in a manner appurtenant to the manor. (e) But if the covenant had been with a stranger to celebrate divine service in the chapel of A. and his heirs, there the assignee shall not have an action of covenant; for the covenant cannot be annexed to the manor, because the covenantee was not seised of the manor. See in Spencer's case before remembered, divers other diversities between warranties and covenants which yield but damages.

And here it is to be observed, that an assignee of part of the land shall vouch as assignee. (*) As if a man make a feoffment in fee of two acres to one, with warranty to him, his heirs, and assigns, if he make a feoffment of one acre, that feoffee shall vouch as assignee; for there is a diversity between the whole estate in part, and part of the estate in the whole, or of any part. As if a man hath a warranty to him, his heirs, and assigns, and he make a lease for life, or a gift in tail, the lessee or donee shall not vouch as assignee, because he hath not the estate in fee-simple whereunto the warranty was annexed; but the lessee for life may pray in aid, or the lessee or donee may vouch the lessor or donor, and by this means he shall take advantage of the warranty. But if a lease for life, or a gift in tail be made, the remainder over in fee, such a lessee or donee shall vouch as assignee, because the whole estate is out of the lessor, and the particular estate and the remainder do in judgment of law to this purpose make but one estate.

(f) If a man infeoff three with warranty to them and their heirs, and one of them release to the other two, they shall vouch; but if he had released to one of the other, the warranty had been extinct for that part, for he is an assignee.

*(g) If a man doth warrant land to two men and their heirs, and the one make a feoffment in fee, yet the other shall vouch for his moiety. If a man at this day be infeoffed with warranty to him, his heirs and assigns, and he make a gift in tail, the remainder in fee, the donee make a feoffment in fee, that feoffee shall not vouch as assignee, because no man shall vouch as assignee but he that cometh in, in privy of estate; but he must vouch his feoffor, and he to vouch as assignee, but such an assignee may rebut. If the warranty be made to a man and his heirs without the word (assigns), yet the assignee, or any tenant of the land, may rebut. And albeit no man shall vouch or have a *warrantia cartæ*, either as party,

price as she otherwise would, and it was held that the action was maintainable. *Kingdon v. Nottle*, 4 Maul. & S. 53. See further as to covenant, in the note at the end of this chapter. —[Ed.]

heir, or assignee, but in privity of estate, yet any that is in of another estate, be it by disseisin, abatement, intrusion, usurpation, or otherwise, shall rebut by force of the warranty, as a thing annexed to the land, which sometime was doubted (*h*) in our books (*n* 2). But herein is a diversity to be observed, when in the cases aforesaid he that rebutteth claimeth under the warranty; and when he that would rebut claimeth above the warranty; for there he shall not rebut. And therefore if lands be given to two brethren in fee-simple, with a warranty to the eldest and his heirs, the eldest dieth without issue, the survivor, albeit he be heir to him, yet shall he neither vouch nor rebut, nor have a *warrantia cartæ*, because his title to the land is by relation above the fall of the warranty, and he cometh not under the estate of him to whom the warranty is made, as the disseisor, &c. doth.

by disseisin, &c.
(*h*) 35 E. 3. 21.
26 E. 3. 56.
Lib. 10. fol. 96b. Seymour's case.
7 E. 3. 34. 35.
8 E. 3. 10.
46 E. 3. 4.
10 E. 3. 42.
45 E. 3. 18.
10 Ass. 5. 35.
Ass. 9. 22 Ass.
39. 88. 31.
Ass. 13.
But persons claiming above the warranty, can neither vouch nor rebut.

(i) If a man make a gift in tail at this day, and warrant the land to him, his heirs, and assigns, and after the donee make a feoffment and dieth without issue, the warranty is expired as to any voucher or rebutter, for that the estate in tail whereunto it was knit is spent: otherwise it is, if the gift and feoffment had been made before the statute of *donis conditionalibus*: for then both the donee and feoffee had a fee-simple: and so are our books to be intended in this and the like cases.

(311)*
(*i*) Lib. 3. fol. 62. Lincoln College case.

(k) If A. be seised of lands in fee, and B. releaseth unto him or confirmeth his estate in fee with warranty to him, his heirs, and assigns; all men agree this warranty to be good: but some have holden, that no warranty can be raised upon a bare release or confirmation without passing some estate or transmutation of possession. (*l*) But the law as it appeareth by Littleton himself, is to the contrary, and that both the party, and (as some do hold) his assignees shall vouch; but he that is vouched in that case must be present in court, and ready to enter into the warranty and to answer; and the tenant must show forth the deed of release or confirmation with warranty, to the intent the demandant may have an answer thereunto, and either deny the deed, or avoid it; for that at the time of the confirmation made, he by whom it was made had nothing in the land, &c. for otherwise the demandant may counter-

(*k*) 14 E. 3. Garr. 108.
12 H. 7. 1.

(*l*) 11 H. 4. 22.
10 E. 3. 62.
21 E. 3. 27.
Vid. sect. 706.
738. & 745.

(*n* 2) The warranty wrought by the word *dedi*, and the warranty annexed to an exchange, partition, &c. does not extend to assignees; but yet in cases of exchange, and of warranties by the word *dedi*, the assignee shall rebut. Ant. 384 a. and b. p. 254. So any man that has the possession of land, although he have no deed to show how he came by the possession, or how he is assignee, may rebut the demandant, and so bar him, and defend his own possession; and therefore the tenant by the curtesy, donee in tail that is in of another estate, i. e. by disseisin, or feoffment of a disseisor, an assignee by force of a warranty made to a man and his heirs, or feoffee of a donee in tail, may rebut and bar the demandant by the warranty. And though, in general, he that comes to the land merely by act of law in the post, as the lord of a villain, or the lord by escheat, claiming by title paramount, cannot take benefit of a warranty; yet it seems, if the warranty had bound, and had been a bar in right, that is, in the case of the villain, if the warranty had descended before the lord had entered; and in the other case if the ancestor had died before the tenant (so that the warranty had descended before the escheat), the lord of the villain in the one case, and the lord by escheat in the other, should take advantage of the warranty by way of rebutter. *Lincoln College case*, 3 Co. 62, 64.—[Ed.]

W. 1. c. 40.
*385 b.
Vid. 20 E. 1.
Statute de
Vocat. ad
Warrant.

plead the voucher by the statute of W. 1. viz. that neither vouchee nor any of his ancestors had any *seisin whereof he might make a feoffment. And this is grounded upon the said statute of W. 1. the words whereof be, *S'il neit son garrantor en present* (o 2), *que luy voile garranter de son gree, et maintenant enter en respons*, otherwise the tenant must be driven to his *warrantia cartæ*.

(312)*
(m) 22 H. 6. 15.
19 H. 6. 73.
26 H. 6. 73.
2 H. 4. 13.
41 E. 3. Garr.
15. 43 E. 3.
17. 43 Ass. 42.
12 Ass. 17.
12 E. 3. Taille
3. 22 E. 4. 16 b.
44 E. 3. 10.
44 Ass. Bas-
singborn's.
Ass. Lib. 10.
fol. 97. Sey-
mour's case.
(n) Lib. 3. fol.
63. Lincoln
College case.

*(m) But a warranty of itself cannot enlarge an estate; as if the lessor by deed release to his lessee for life, and warrant the land to the lessee and his heirs, yet doth not this enlarge his estate.

(n) If a man make a feoffment in fee with warranty to him, his heirs, and assigns, by deed (as it must be), and the feoffee infeoffeth another by parol (p 2), the second feoffee shall vouch, or have a *warrantia cartæ* (as hath been said) as assignee, albeit he hath no deed of the assignment, because the deed comprehending the warranty, doth extend to the assignees of the land; and he is a sufficient assignee, albeit he hath no deed.

(o) 29 E. 3. 70.
17 E. 2. Join-
der in Action,
1. 11 E. 4. 8.

(o) If a man infeoff two, their heirs and assigns, and one of them make a feoffment in fee, that feoffee shall not vouch as assignee (1).

If a man make a feoffment in fee to A. his heirs and assigns, A. infeoffeth B. in fee, who re-infeoffeth A., he or his assigns shall never vouch, for A. cannot be his own assignee. But if B. had infeoffed the heir of A., he may vouch as assignee; for the heirs of A. may be assignee to A. inasmuch as he claimeth not as heir.

(p) 14 H. 4. 3.

(p) If a man make a feoffment by deed of lands to A. to have and to hold to him and his heirs, and bind him and his heirs to warrant the land in *formâ prædictâ*; this warranty shall extend to the feoffee and his heirs: but if he had warranted the land to the feoffee, the warranty had not extended to his heirs, except the words had been, to him and his heirs.

(Ante, 20 b.)

If a man letteth lands for life, the remainder in tail, the remainder *eâdem formâ*, this is a good estate tail, *quid idem semper refertur proximo præcedenti* (2).

(o 2) i. e. if he have not his warrantor present. The stat. W. 1. c. 40. enacts, that in writs of right, and also in possessory writs, there shall be a counterplea, that the vouchee or his ancestors never had seisin of the lands in demand, or the services of them, since the seisin of him by whom the demandant claims, and before the writ purchased, whereof he might enfeoff the tenant or his ancestors. But if the vouchee was present in court, and entered immediately into warranty, the demandant could not counterplead. 2 Inst. 243. 6 Com. Dig. 438, 439. Voucher, (B 2). But the Statute of Vouchers, 20 Ed. 1. stat. 1. which enacts that such counterplea, or averment, should be admitted, whether the party vouched be absent or present, without any respect had unto his absence or presence. By the 14 Ed. 3. stat. 1. c. 18. it is enacted, that if the tenant vouch to warranty a dead man, an averment that he is dead, should be received.—[Ed.]

(p 2) That is, before the 29 Cha. 2. c. 3.—[Ed.]

(1) The other may vouch for his moiety, as is observed in the preceding page; but if they make partition, both have lost it. Hob. 25.—[Butler, Note 334.]

(2) If a man makes a feoffment in fee by deed to three, and warrants the land to them &

A man infeoffeth a woman with warranty, they intermarry *and are impleaded, upon the default of the husband the wife is received, she shall vouch her husband, &c. notwithstanding the warranty was put in suspense. (q) And so, on the other side, if a woman infeoff a man with warranty, and they intermarry and are impleaded, the husband shall vouch himself and his wife by force of the said warranty.

(r) An infant *en ventre sa mere* may be vouched if God give him a birth, and if not, such a one heir to the warranty; but he cannot be vouched alone without the heir at the common law, for process shall be presently awarded against him.

"Every warranty which descendeth to him that is heir to him who made the warranty by the common law, &c." Hereupon many things worthy to be known are to be understood.

(s) First, that if a man infeoffeth another of an acre of ground with warranty, and hath issue two sons, and dieth seised of another acre of land, of the nature of borough English, the feoffee is impleaded, albeit the warranty descendeth only upon the eldest son yet may he vouch them both; the one as heir to the warranty, and the other as heir to the land: for if he should vouch the eldest son only, then should he not have the fruit of his warranty, viz. a recovery in value; the youngest son only he cannot vouch, because he is not heir at the common law, upon whom the warranty descendeth (1).

(t) So it is of heirs in gavelkind, the eldest may be vouched as heir to the warranty, and the other sons in respect of the inheritance descended unto them. (u) And in like sort, the heir at the common law, and the heir of the part of the mother, shall be vouched: but the heir at the common law may be vouched alone in both these cases, at the election of the tenant: *et sic de similibus* (w) in the same manner if a man dieth seised of certain lands in fee, having issue a son and a *daughter by one venter, and a son by another, the eldest son entereth and dieth, the land descends to the sister; in this case the warranty descendeth on the son, and he may be vouched as heir, and the sister, as heir of the land: in which and the other case of borough English, the son and heir by the common law having nothing by descent, the whole loss of the recovery in value lieth upon the heirs of the land, albeit they be no heirs to the warranty. Then put the case that there is a warranty paramount. Who shall deraign that warranty? and to whom shall the recompense in value go? Some have said, that as they are vouched together, so shall they avouch over, and that the recompense in value shall enure according to the loss; and that the effect must pursue the cause, as a

390 a.

A woman in certain cases may vouch her husband.

(313)*

and e con-

verso.

(q) 4 E. 2.

Voucher 243.

246.

An infant en

ventre sa

mere may be

vouched with

the heir at

law.

(Ante, 348 a.)

(r) Tempe

E. 1. Gard.

153. 31 E. 1.

Briefe 573.

E. 2. Vouch

37. 11 E. 2.

D. 12. 11 E. 3.

Quar. Imp.

158. 38 E. 3.

7. & 29. 41 E.

2. in Dower.

9 H. 6. 24. Pl.

Com. Stow-

el's case, per

Saunders &

Browne.

*376 a.

Heir at com-

mon law may

be vouched

with the heir

of the land;

(s) 40 E. 2. 14.

(Mod. Rep.

96. 2 Cro.

218.)

or alone, at

the tenant's

election.

(w) 49 Ass. 4.

38 E. 3. 22.

(Hob. 25.)

(w) 32 E. 3.

Vouch. 94.

35 H. 6. 33.

(314)*

Loss of the

recovery in

value and the

recompense,

in such case,

belong to the

heir of the

land.

(Pl. Com. 516.)

cuiuslibet eorum, this warranty is joint because the estate or interest was joint; but, if their estates were several, their warranty would be several. 5 Rep. 19.—[Butler, Note 335.]

(1) "38 E. 3. 22. 43 E. 3. 19. 48. Ass. 41. 43 E. 3. 55. 21 E. 3. 46. 21 E. 3. 36. 21 H. 7. 12. 6 H. 7. 2." Hal. MSS.—[Butler.]

recovery in value by a warranty of the part of the mother shall go to the heir of the part of the mother, &c.

(2 Cro. 218.) Some others hold, that it is against the maxim of law, that they that are not heirs to the warranty should join in voucher, or to take benefit of the warranty which descended not to them ; but that the heir at the common law, to whom the warranty descended, shall deraign the warranty, and recover in value ; and that this doth stand with the rule of the common law.

Others hold the contrary, and that this should be both against the rule of law, and against reason also ; for by the rule of law (x) the vouchee shall never sue to have execution in value, until execution be sued against him. But in this case execution can never be sued against the heir at the common law, therefore he cannot sue to have execution over in value. Secondly, it should be against reason, that the heir at the common law should have *totum lucrum*, and the special heirs *totum damnum*. I find in our books (y) that this reason is yielded, that the special heir should not be vouched only ; for (say they) if the special heirs should be vouched only, then could not they deraign the warranty over ; which should be mischievous, that they should lose the benefit of the warranty, if they should be vouched only. But if the heir at the common law were vouched with them, (as by the law he ought) all might be saved, and therefore study well this point how it may be done.

(315)*

(x) Vid. Pl. Com. fol. 514.
(3 Rep. 5.
10 Rep. 36.
Dr. and Stud.
41 b. 8 Rep.
101 b. See
Cro. Eliz.
670.)

Bastard
eigne must be
vouched
alone.

(a) 17 E. 3.
29. 20 E. 3.
Vouch. 129.
22 E. 3. Vouch.
94. 5 H. 7. 2.
Diversity be-
tween a per-
sonal lien
and a real
lien, as to
special heirs.
(b) 11 H. 7. 12.
11 E. 3. ut.
Det. 7. Dy.
5 Ellis. 238.
(Moor. 74.)
(c) 11 H. 7. 12.
(2 Cro. 26 b.
218. 1 Siderf.
238. 272. 420.
Hob. 25.)
386 b.

(d) 17 E. 3.
Joint 41. 16
H. 7. 13. 29
E. 3. 46.
12
H. 7. 3. 22 E. 3.
1. 17 E. 3. 8.
30 E. 3.
40. 19 H. 6. 55.
14 b. 3. fol. 14.

*(z) If tenant in general tail be, and a common recovery is had against him and his wife, where his wife hath nothing, and they vouch, and have judgment to recover in value, tenant in tail dieth, and the wife surviveth : for that the issue in tail had the whole loss, the recompense shall enure wholly to him ; and the wife, albeit she was party to the judgment, shall have nothing in the recompense, for that she loseth nothing.

(a) If the bastard eigne enter and take the profits, he shall be vouched only, and not the bastard and the mulier ; because the bastard is in appearance heir, and shall not disable himself.

(b) If a man be seised of lands in gavelkind, and hath issue three sons, and by obligation bindeth himself and his heirs and dieth, an action of debt shall be maintainable against all the three sons, for the heir is not chargeable unless he hath lands by descent.

(c) So, if a man be seised of land on the part of his mother, and bind himself and his heirs by obligation, and dieth, an action of debt shall lie against the heir on the part of the mother, without naming of the heir at the common law. And so note a diversity between a personal lien of a bond, and a real lien of a warranty.

(d) If two men make a feoffment in fee with a warranty, and the one die, the feoffee cannot vouch the survivor only, but the heir of

him that is dead also (s 2); but otherwise, if two jointly bind themselves in an obligation, and the one die, the survivor only shall be charged.

If a feme heir of a disseisor infeoffeth me with warranty, and marrieth with the disseisee, if after the disseisee bring a *præcipe* against me, I shall rebut him, in respect of the warranty* of his wife, and yet he demandeth the land in another's right (r 2). And so, if the husband and wife demand the right of the wife, a warranty of the collateral ancestor of the husband shall bar (u 2).

ALSO, in some cases it may be, that albeit a collateral warranty be made in fee, &c. yet such a warranty may be defeated and taken away. As if tenant in tail discontinue the tail in fee, and the discontinuee is disseised, and the brother of the tenant in tail releaseth by his deed to the disseisor all his right, &c. with warranty in fee, and dieth without issue, and the tenant in tail hath issue and die; now the issue is barred of his action by force of the collateral warranty descended upon him (w 2). But if afterwards the discontinuee entereth upon the disseisor, then may the heir in tail have well his action of formedon, &c., because the warranty is taken away and defeated, for when a warranty is made to a man upon an estate which he then had, if the estate be defeated, the warranty is defeated (x 2).

"And dieth without issue, &c." Here (as before in this Chapter hath been noted) the collateral warranty doth descend upon the issue in tail, before any right doth descend unto him.

"When a warranty is made to a man upon an estate which he then had, if the estate be defeated, the warranty is defeated." Here it appeareth, that although a collateral warranty be descended, (e) yet, if the state whereunto the warranty was annexed be defeated albeit it be by a mere stranger (as in this case that Littleton here puts, by the discontinuee) the warranty is defeated; and although the discontinuance remain, and no remitter wrought to the heir, yet

Matthew Herbert's case. (4 Leon. 322. March. 125. Allen. 41. Savil. 692. Clay. 3.)

365 b. A warranty may bar a person who claims in another's right. 21 R. 2. Judg. 263. (2 Rol. Abr. 776. 8 Rep. 53 b. Post. 326 a. Dr. & Stud. 41 b. 1 Leon. 261.)

(316)*

LITTLETON. [Sect. 741. 388 a.]

8. Warranty, how defeated, suspended, determined, or extinguished. By matter in law. The estate to which the warranty was annexed being defeated, the warranty is also defeated.

388 a. Vid. sect. 707.

389 a.

(e) 3 H. 7. 9 b. 16 E. 3. tit. Continual Claims 10. 9 H. 4. 8. Pl. Com. 158.

(s 2) But in Moor. 20. it is said, that if two make a feoffment, and one of them die, the heir and the survivor may be vouched, or the survivor only, at the election of him who has the warranty.

According to Sir William Herbert's case, 3 Co. 14. if two are bound to warrant land, and both of them die, the heirs of both of them ought to be vouched, and shall be equally charged. And if the heir be vouched in the ward of three several persons, the one of them only shall not be charged, but they shall all be charged equally. Ibid.—[Ed.]

(r 2) For it shall be presumed, that he has land in her right to the value of that which he demands, which might be recovered from him and his wife by force of the warranty, and therefore he shall be rebutted to avoid circuitry of action. Hawk. Abr. 467.—[Ed.]

(u 2) Supra, p. 282. n. (N 1).—[Ed.]

(w 2) Supra, p. 282. n. (N 1).—[Ed.]

(x 2) But if an estate be bound by a warranty, and afterwards the estate to which warranty was annexed be defeated as to a particular estate only, the warranty shall not be defeated: as if tenant for life, remainder to A., be disseised, and an ancestor of A. releases to the disseisor with warranty and dies, and afterwards tenant for life enters or recovers; yet the remainder will be bound (at common law) by the warranty. 2 Rol. Abr. 740. 4 Com. Dig. 303.—[Ed.]

(317)* the warranty is defeated, and bar removed, so as the *issue in tail (10 Rep. 95.) may have his *formedon*, and recover the land. *Sublato principali tollitur adjunctum* (1).

LITTLETON.
[Sect. 742.
389 a.]

*389 b.

*IN the same manner it is, if the discontinnee make a feoffment in fee, reserving to him a certain rent, and, for default of payment a re-entry, &c. and a collateral (78) warranty of the ancestor is made to the feoffee that hath the estate upon condition, &c. and (A) dieth without issue, albeit that this warranty shall descend upon the issue in tail, yet if after the rent be behind, and the *discontinuee enter into the land (79), then shall the issue in tail have his recovery by writ of formedon, because the collateral warranty is defeated. And so if any such collateral warranty be pleaded against the issue in tail, in his action of formedon, he may show the matter as is aforesaid, how the warranty is defeated, &c. and so he may well maintain his action, (80) &c.*

389 b.
(10 Rep. 95.)

Here Littleton putteth another case upon the same ground and reason, viz. where the state whereunto the warranty is annexed is defeated, there the warranty itself is defeated also, which is one of the maxims of the common law.

LITTLETON.
[Sect. 743.
389 b.]

So if the warrantor takes back as large an estate as he had made, the warranty is defeated:

(318)*

ALSO, if tenant in tail make a feoffment to his uncle, and after the uncle make a feoffment in fee with warranty, &c. to another, and after the feoffee of the uncle doth re-ensfeoff again the uncle in fee, and after the uncle ensfeoffeth a stranger in fee without warranty, and dieth without issue, and the tenant in tail dieth, if the issue in tail will bring his writ of formedon against the stranger that was the last feoffee (81) and that by the uncle, the issue shall not be barred by the warranty that was made by the uncle to the first feoffee of his uncle, for that the said warranty was defeated and taken away, because the uncle took back to him (82) as great an estate from his (83) first feoffee to whom the warranty was made, as the same feoffee had from him. And the cause why the warranty is defeated is this, viz. that if the warranty should stand in his force, then the uncle should warrant to himself, which cannot be.*

(78) *garrantie de ancestor est fait—ancestor rekasa*, L. and M. and Roh.
(79) *Ec.* added in L. and M. and Roh.
(80) *Ec.* not in L. and M. nor Roh.

(81)* *Ec.* added in L. and M. and Roh.
(82) *Reprist—prist*, L. and M. and Roh.
(83) *dit*, added in L. and M. and Roh.

(1) If a man makes a feoffment with warranty, non-feoffment is a good plea; for if the feoffment be avoided, the warranty also is avoided, for that depends upon the feoffment. But it is otherwise in the case of a lease for years; for if a man makes a lease for years and covenants to warrant and defend the land to the lessee; in this case the lessee, if he be ousted, whether by one having title or not, may maintain covenant against the lessor. Brownlow's Rep. part 2. fol. 165.—[Butler, Note 343.]

(A) Here it seems, the words "the ancestor" should be understood. For, as Mr. Ritso observes, it is not the discontinnee who is here spoken of, nor the feoffee who hath the estate upon condition, but the collateral ancestor of the tenant in tail, who made the warranty. See Mr. Ritso's Intr. p. 114. and the reading above under note (78).—[Note from 18th Lond. Edit. 1823.]

Here Littleton putteth another case where a warranty may be defeated, as when the uncle taketh back as large an estate as he had made, the warranty is defeated, because he cannot warrant land to himself. (*f*) And so it is, if the uncle had made the warranty to the feoffee, his heirs and assigns, and taken back an estate in fee, and after infeoffed another, yet the warranty is defeated, for that he cannot be assignee to himself, and a man shall not regularly vouch himself as assignee of a fee-simple, and the law will not suffer things inutile and unprofitable. (*g*) And yet if the father be enfeoffed with warranty to him and his heirs, the father enfeoffeth his heir apparent in fee (A 3) and dieth, he (as it hath been said) shall vouch himself, and the heir in borough English, by reason the act in law determined the warranty between the father and the son (B).

390 a.
(Vaugh. 389.)
(*f*) Temps
E. 1. Vouch.
266. 40 E. 3.
14. 44 E. 3.
33. 26 E. 3.
43 b. 26 E. 3.
68. 14 E. 3.
Vouch. 106.
16 E. 3.
Vouch. 87.
19 E. 3.
Vouch. 122.
17 E. 3. 73. 74.
20 H. 6. 26.
(2 Rol. Abr.
739.)
(*g*) 40 E. 3.
14 a. 41 E. 3.
26 a. (Ante,
384. Rol. Abr.
98 a.

(*h*) But if a man maketh a feoffment in fee with warranty to the feoffee, his heirs and assigns, and the feoffee re-enfeoffeth the feoffor and his wife, or the feoffor and any other stranger, the warranty remaineth still (B 3); or if two do make a feoffment with warranty to one and his heirs and assigns, and the feoffee re-enfeoff one of the feoffors, the warranty doth also remain (C 3).

secus if the
estate was
reconveyed
to him and
his wife;
(A) 11 H. 4.
20. 42. 17 E.
3. 47. 59. 18
E. 3. 56. 29
E. 3. 46. 30
E. 3. 9.
(Vaugh. 388.)
or to him and
a stranger,
&c.

BUT, if the feoffee had made an estate to the uncle for term of life, or in tail, saving the reversion, &c. or a gift in tail to the uncle, or a lease for term of life, the remainder over, &c. in this case the warranty is not (84) altogether taken away but is put in suspense during the estate that the uncle hath. For after that, that the uncle is dead without issue, (85) &c. then he in the reversion, or he in the remainder, shall bar the issue in tail in his writ of formedon by the collateral warranty in such case, (D 3), &c. But otherwise it is where the uncle hath as great estate in the land of the feoffee to whom the warranty was made, as the feoffee hath himself. Causa patet.

LITTLETON.
[Sect. 744.
390 a.]
Where the
warrantor
takes back a
less estate,
the warranty
is but sus-
pended.
(319)*

“For term of life, or in tail.” Here it appeareth, (*i*) that by taking a (*k*) lease for life, or a gift in tail, the warranty is suspended.

390 a.
(D) 16 E. 3.
Vouch. 87.
44 E. 3. 38.
26 E. 3. 56.
17 E. 3. 47.

10 E. 3. 30. 12 E. 3. Counterplea de Vouch. 42. 14 E. 3. Ib. 12. (4 Rep. 62.)
(k) 6 E. 2. Vouch. 257. 3 E. 3. Ib. 201. 5 E. 3. Ib. 173. 18 E. 3. 52. 14 E. 3. Vouch. 109.
31 E. 3. Ib. 25. 43 E. 3. 7. 44 E. 3. 38. 32 E. 3. Voucher 102.

“But is put in suspense.” (*l*) Tenant in tail maketh a feoffment in fee with warranty, and disseiseth the discontinuee, and dieth

(D) 21 E. 3.
36 a. & b. 39
E. 3. 21. 44 E.

(84) *pas*, not in L. and M. nor Roh.

(85) &c. added in L. and M. and Roh.

(A 3) It appears from what follows, that the words, “with warranty,” should here be understood.—[*Ed.*]

(B) *Vide ante* 110 b. 140 b. 376 b. 384 b. 385 b.—[Note from 18th Lond. Edit. 1823.]

(B 3) For though the fee-simple of the warranty and of the estate warranted meet in the same person, yet another is jointly seised with him, who would be prejudiced if the warranty should be extinct. Hawk. Abr. 497, 498.—[*Ed.*]

(C 3) And the reason is, because the other feoffor may still warrant the lands to him who was his companion, as well as to the first feoffee. Hawk. Abr. 498.—[*Ed.*]

(D 3) *Supra*, p. 282. n. (N 1).—[*Ed.*]

3. 26. 45 E. 3.
Title 32. 44
E. 3. Ibid. 31.
33 E. 3. Ibid.
4. (3 Leon. 10.
Cro. Car. 145.)
*390 b.

seised, leaving assets to his issue. Some hold, that, in respect of this suspended warranty and assets, the *issue in tail shall not be remitted, but that the discontinuee shall recover against the issue in tail, and he take advantage of his warranty, if any he hath, and after in a *formedon* brought by the issue, the discontinuee shall bar him in respect of the warranty and assets; and so every man's right saved (1).

LITTLETON.
[Sect. 745.
390 b.]

The warrant-
ing ancestor
being attaint-
ed, the war-
ranty is de-
termined;

ALSO, if the uncle after such feoffment made with warranty, or a release made by him with warranty, be attainted of felony, or outlawed of felony, such collateral warranty shall not bar, nor grieve the issue in the tail, for this, that by the attainder of felony, the blood is corrupted between them, &c.

390 b.
Sect. 733. 706.

Note a warranty granted upon a release. Hereof you shall read before in this Chapter.

(320)*

(m) 8 E. 2.
Voucher 27.
Vid. 36 E. 3.
29 b. Smile.

*And where Littleton saith (*attaint of felony*), if a man be convicted of felony by verdict, and delivered to the ordinary to make purgation, (m) he cannot be vouched, for that the time of his purgation (if any should be) is uncertain, and the demandant cannot be delayed upon such an uncertainty; but the tenant is not without remedy, for he may have his *warrantia cartæ*.

391 b.

In the same manner it is, if a man be attainted of high treason, the warranty is also defeated.

LITTLETON.
[Sect. 746.
391 b.]

ALSO, if tenant in tail be disseised, and after make a release to the disseisor with warranty in fee, and after the tenant in tail is attaint, or outlawed of felony, and hath issue and dieth; in this case the issue in tail may enter upon the disseisor. And the cause is for this, that (87) nothing maketh discontinuance in this case but the warranty, and warranty may not descend to the issue in tail, for this, that the blood is corrupt between him that made the warranty and the issue in tail.

LITTLETON.
[Sect. 747.
391 b.]
[COKE,
392 a.]
Vid. sect. 711,
712.

*FOR the warranty always abideth at the common law (the collateral warranty is not restrained by the statute of *donis conditionalibus*, but a lineal warranty is restrained by the statute, unless there be assets; as formerly at large hath been said), and the common law is such (88), that when a man is attaint or outlawed of felony, which outlawry is an attainder in law, that the blood between him and his son, and all others which shall be said his heirs, is corrupt (E 3), so that (89) nothing by descent may descend to any that may be said his heir by the common law. And the*

(87) *nul*, added in L. and M. and Roh.
(88) *tiel*, added in L. and M. and Roh.

(89) *nul*, added in L. and M. and Roh.

(1) "But clearly, if the warranty were never executed, as in the case of *fine*, surrender with warranty, and assets, there shall be a remitter." Hal. MSS.—[Butler, Note 344.]

(x 3) See ant. p. 189. n. (c).—[Ed.]

wife of such a man that is so attainted, shall never be endowed of the tenements of her husband so attainted (F 3). And the cause is, for that men should more eschew to commit felonies (90). But the issue in tail, as to the tenements tailed, is not in such case (91) barred, *because (92) he is inheritable by force of the statute, and not by the course of the common law: and therefore such attainder of his father, or of his ancestor, in the tail (93), shall not put him out of his right by force of the tail, &c.

(321)*

“The issue in tail may enter.” And the reason is, for that by the attainder of the father, it is now in judgment of law but a release without warranty; for albeit the warranty at the time of the release was effectual, yet it worketh no discontinuance unless it descendeth upon the issue in tail; so as if it be defeated, extinct, or determined in the life of the tenant in tail, then no discontinuance is wrought; and so it is if tenant in tail hath issue, and releaseth to the disseisor with warranty, and after is attainted of felony, and after obtaineth his pardon and dieth, the issue in tail may enter; (*) for the pardon doth not restore the blood as to the warranty, nor maketh the issue in that case inheritable to the warranty. But if the issue in tail in that case had been attainted of felony in the life of his father, and obtained his charter of pardon, and then his father had died, the issue cannot enter into the *land in respect of the corruption of blood upon the attainder of himself.

391 b.

(Plowd. 252 a. 3 Inst. 241.)

though he be afterwards pardoned:

(*) 27 E. 3.

77. 1 E. 3. 4.

6 E. 3. 55.

9 H. 5. 9.

31 E. 1. Dis-

cont. 17. 46

E. 3. Petit. 20.

26 Ass. 2.

49 Ass. 4.

29 Ass. 11.

13 H. 4. 8.

13 H. 7. 17.

Pl. Com. in

Walsing-

ham's case.

3 E. 2. Dis-

cont. Br. 61.

Stanf. Pl. Cor.

195. 196. See

in the Chap-

ter of Tenant

by the Cur-

sey, touching

this matter.

(Plowd. 557 b.

Ante, 8 a.)

* 392 a.

(n) Bract.

lib. 3. fol. 132.

133. 276 & lib.

5. 374. Brit-

ton, fol. 215 b.

Fleta, lib. 1.

cap. 28

accus as to

issue born

after the par-

don.

(1 Cro. 435.

Ante, 8 a.)

(n) And it is a general rule, that having respect to all those whose blood was corrupted at the time of the attainder, the pardon doth not remove the corruption of blood neither upward nor downward. As if there be grandfather, father, and son, and the grandfather and father have divers other sons, if the father be attainted of felony and pardoned, yet doth the blood remain corrupted not only above him and about him, but also to all his children born at the time of his attainder.

But in the case of Littleton, if tenant in tail at the time of his attainder had no issue, and after the obtaining of his pardon had issue, that issue should have been bound by the warranty; for by the pardon he was as a new creature, *tunquam *filius terræ*, whose blood upwards remain corrupted; but for the issue had after the pardon, he is inheritable to his father; and if his father had issue before the pardon, and hath issue also after, and dieth, nothing can descend to the youngest, for that the eldest is living and disabled. But if the eldest son had died in the life of the father without issue, then the youngest should inherit.

(322)*

(o) If a seignory be granted with warranty, and the tenancy escheat, the seignory whereunto the warranty was annexed is extinct,

392 b.

(o) 6 H. 4. 1.

46 E. 3.

(90) &c. added in L. and M. and Roh.

(91) *barre*, not in L. and M. nor Roh.(92) *il*, added in L. and M. and Roh.

(93) &c. added in L. and M. and Roh.

(F 3) But at this day the wife of a man attainted of felony is dowable. See ant. 41 a. vol. 1. p. 618. n. (q 1).—[Ed.]

Vouch. 72.
Pl. Com. 292.
16 E. 3. Age
46. 18 H. 3.
Vouch. 281.
23 E. 3. Garr.
77. See in
the Chapter
of Villenage,
sect. 200.

and consequently the warranty defeated, and it shall not extend to the land ; *et sic in similibus*.

If a collateral ancestor release with warranty, and enter into religion, now the warranty doth bind ; but if after he be deraigned, now it is defeated.

LITTLETON.
[Sect. 748.
392 b.]
By matter in
deed.
On release of
all warran-
ties, or all
covenants
real, or all
demands, by
the warran-
ties to the
warrantor,
the warranty
is extinct.
[COKE,
393 a.]

ALSO, if tenant in tail enfeoff his uncle, which enfeoffs another in fee with warranty, if after the feoffee by his deed release to his uncle all manner of warranties, or all manner of covenants real, or all manner of demands, by such release the warranty is extinct. And if the warranty in this case be pleaded against the heir in tail that bringeth his writ of formedon, to bar the heir of his action, if the heir have (94) and plead the said release, &c. he shall defeat the plea in bar, &c. (Here it appeareth, that the release being made to the uncle being his ancestor, the deed doth after the decease of the uncle belong to him, and therefore he cannot plead it, unless he showeth it forth.) And many other cases and matters there be, whereby a man may defeat a warranty, &c.

392 b.
(1 Rep. 112 b.)
(5 Rep. 71 a.)
(393) *
Vid. lib. 3.
fol. 153, 154.
Aitham's
case. 46 E. 3.
2. 45 E. 3. 23.
Vid. before in
the Chapter
of Releases,
sect. 508.
(Post, 291 b.)

Littleton, having spoke in what cases warranties may be defeated and extinguished by matter in law, now he showeth how a warranty may be discharged or defeated by matter in deed : and hereupon he putteth an example of a release in three several manners.

First, by a release of all warranties.

*Secondly, by release of all covenants real.

And thirdly, by a release of all demands.

(p) 14 Ass. pl.
2. 3 Eliz. 17.
168. 9 E. 4.
52 b. (Plowd.
2 b. Manx-
ell's case.
(Ante, 319 b.
20 a. 6 Rep.
7.)
*398 a.

(p) If a man make a gift in tail with warranty, this warranty is also intailed, and therefore a release made by tenant in tail of the warranty, shall not bar the issue, no more than his release shall bar the issue to bring an attain upon a false verdict, or a writ of error upon an erroneous judgment given against the father, nor his gift can bar the issue of the deed that create the estate tail, nor of any other deed necessary for defence of the title.

(5 Rep. 70.)
(q) 45 E. 3. 23.
(3 Rep. 14.)

"After the feoffee release." Littleton here putteth his case where one is bound to warrant : put the case (q) then that two make a feoffment in fee, and warrant the land to the feoffee and his heirs, and the feoffee release to one of the feoffors the warranty, yet he shall vouch the other for the moiety. And so it is if one enfeoff two with warranty, and the one release the warranty, yet the other shall vouch for his moiety.

So it may be
extinguished
by a defeas-
ance ;

"And many other cases and matters there be, whereby a man may defeat a warranty, &c." As, namely, by a defeasance, as other things executory may. Also a warranty may lose his force

(94) *le dit releas et cco pledast—et pledast le dit releas, &c.* in L. and M.

by taking benefit of the same. In a *præcipe* the tenant voucheth, and at the *sequatur sub suo periculo*, the tenant and the vouchee make default, whereupon the demandant hath judgment against the tenant. And afterwards the demandant brings a *scire facias* against the tenant to have execution; in this case the tenant may have a *warrantia cartæ*. And if in that case a stranger had brought a *præcipe* against the tenant, he might have vouched again, for by the judgment given against the tenant the warranty lost not his force; but if the tenant had judgment to recover in value against the vouchee, he should never vouch again by reason of that warranty, because he had taken advantage of the warranty. And it is to be observed, that upon the process of *summoneas ad warrantizandum*, if the sheriff return the vouchee summoned, and he make default, the tenant shall have a *capias ad valentiam*; but if he return that the vouchee had nothing, then, after the *sicut alias et pluries*, a *sequatur sub suo periculo* shall issue; and there if the vouchee make default, the tenant shall not have judgment to recover in value, for he was never summoned; and it appeareth of record that he hath nothing, but in the *capias ad valentiam* it appeareth that he had assets, and he had been summoned before: but in some special cases there shall be two recoveries in value upon one warranty. As if a disseisor give lands to the husband and wife, and to the heirs of the husband, the husband alieneth in fee with warranty, and dieth, the wife bringeth a *cui in vita*, the tenant vouch and recovereth in value, if after the death of the wife the disseisee bring a *præcipe* against the alienee, he shall vouch and recover in value again.

(Vaugh. 387.)
4 E. 3. 17. Pl.
Com. in
Browning's
case.
or by taking
benefit of the
same.

(Hob. 27.)

(324)*

(r) So it is where the wife bringeth a writ of dower against the alienee, he shall recover in value, and after her death he shall recover in value again, upon the same warranty.

(r) 45 E. 3.
Vouch. 72.

In the same manner it is, if a man be seised of a rent by a defeasible title, and releaseth to the tenant of the land all his right in the land, and warranteth the land to him and his heirs, if he be impleaded for the rent, he shall vouch and recover in value for the rent; and if after he be impleaded for the land, he shall vouch and recover in value again for the land: but in these and the like cases, the reason is in respect of the several estates recovered, but for one and the same estate he shall never recover but once in value; and though the land recovered in value be evicted, yet shall he never take benefit of that warranty after.

(Hob. 28.)

And as warranties may be defeated in the whole, so they may be defeated as to part of the benefit that may be taken of the same. (s) As he that hath a warranty may make a defeasance not to take any benefit by way of voucher; in the like manner, that he shall take no advantage by way of *warrantia cartæ*, or by way of rebutter.

Warranty
may be de-
feated in part.
(Ante. 357 b.)
(s) 7 H. 6. 43.
13 Ass. 8. 13
E. 3. Garr.
24. 25. 37.
22 H. 6. 51.
8 H. 7. 6.

AND it is to be understood, that in the same manner as the collateral warranty may be defeated by matter in deed or in law: in the

LITTLETON.
[Sect. 749.
393 b.]

Lineal warranty may be defeated in the same manner as collateral warranty. (325)*

*same manner may a lineal warranty be *defeated, (95) &c. For if the heir in tail bringeth a writ of formedon, and a lineal warranty of his ancestor inheritable by force of the tail, be pleaded against him, with this, that assets descended to him of fee-simple, (96) which he hath by the same ancestor that made the warranty; if the heir that is demandant may adnul and defeat the warranty, that sufficeth him; for the descent of other tenements of fee-simple maketh nothing to bar the heir without the warranty, &c.*

393 b.
Temps E. 1.
Garr. 59.
34 E. 1. Ibid.
82. 11 E. 2.
Ibid. 82. 4 E.
3. 24. 5 E. 3.
14. 40 E. 3. 9.
14 H. 4. 39.
24 H. 8. Talle
Br. 33. 4 Mar.
Dyer, 139.
Lib. 10. fol.
37. 38, in Ma-
ry Porting-
ton's case.
(8 Rep. 51.)
(Ante, 374 a.
b.)
(10 Rep. 38.
Plowd. 440 a.
b. Hob. 40.
Moor 55.)

"And a lineal warranty, &c. with this, that assets descended to him, &c." Here it appeareth by Littleton, that a lineal warranty and assets is a good plea in a *formedon* in the descender; wherein it is to be known, that if tenant in tail alieneth with warranty, and leave assets to descend; if the issue in tail doth alien the assets, and die, the issue of that issue shall recover the land, because the lineal warranty descendeth only to him without assets; for neither the pleading of the warranty without the assets, nor the assets without the warranty, is any bar in the *formedon* in the descender. But if the issue to whom the warranty and assets descended had brought a *formedon*, and by judgment had been barred by reason of the warranty and assets; in that case, albeit he alieneth the assets, yet the estate tail is barred for ever; for a bar in a *formedon* in the descender, which is a writ of the highest nature that an issue in tail can have, is a good bar in any other *formedon* in the descender, brought afterwards, upon the same gift.

In this section Littleton sheweth, that in the same manner that a collateral warranty may be defeated by matter in deed, or by matter in law, so may to all intents and purposes a lineal warranty, whereof he putteth an example of a lineal warranty and assets (a 3).

(95) *Esc.* not in L. and M. nor Roh.

(96) *que il ad*, not in L. and M. nor Roh.

(a 3) Warranties have, in modern practice, been totally superseded by covenants; because, if the covenantor covenants for himself and his heirs, it is then a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his executors and administrators (and they are bound by covenants without being named, except in the case of covenants to be performed personally by the covenantor, in which there has been no breach before his death, Cro. Eliz. 553), his personal assets, as well as his real are likewise pledged for the performance of the covenant, which makes such a covenant a better security than a warranty. —It is also in some respects a less security, and therefore more beneficial to the grantor; who usually covenants only for the acts of himself and his ancestors, whereas a general warranty extends to all mankind. 2 Bl. Com. 304.

The covenants usually entered into by a vendor seised in fee are, 1st. that he is seised in fee; 2dly, that he has power to convey; 3dly, for quiet enjoyment by the purchaser, his heirs, and assigns; 4thly, that the lands are free from incumbrances; and, lastly, for further assurances.

Upon the construction of these covenants, the second of them has been held to be synonymous to the first: for if the vendor be seised in fee, he has power to convey. 3 Lev. 46. But the converse of this proposition is not universally true. See 4 Cru. Dig. 78. Where a vendor has only a power of appointment, the first covenant ought to be, that the power was well created, and is subsisting; and the other covenants should be similar to those entered into by a grantor seised in fee. Sugd. Law Vend. 3d edit. p. 327. As to the covenant for quiet enjoyment it was formerly held, that it extended to all eviction whatever.

Mountford v. Catesby, Dyer, 338 a. But it seems to be now settled, that such a covenant shall not extend to a tortious eviction, but to evictions by title only; because the law itself defends every one against wrong. And therefore though a person should covenant in the most general terms for the title to lands, yet such covenant will not be held to extend to tortious entries: for, if a purchaser is tortiously evicted or disturbed, he has his remedy at law; and, if he is legally evicted, he has his action on the covenant. 2 Saund. 178 a. n. 8. 181 a. n. 10. *Dudley v. Folliott*, 3 T. R. 584. Et vid. *Noble v. Smith*, 1 H. Bl. 34. Vaugh. 122. But where a person covenants to indemnify a purchaser against a particular person by name, there the vendor is bound to defend the purchaser against the entry of that person, whether by title or not. *Foster v. Mapes*, Cro. Eliz. 212. Hob. 35. 1 Rol. Abr. 430. pl. 13. *Haynes v. Bickerstaff*, Vaugh. 118. A covenant for right to convey extends not only to the title of the covenantor, but also to his capacity to grant the estate. Therefore, where, upon a conveyance by a man and his wife, the husband covenanted that they had good right to convey the lands, and the wife was under age, it was held, that the covenant was broken, *Nash v. Abston*, Sir T. Jones, 195. Sugd. Law Vend. 415.

These covenants are real and pass to all the assignees of the land, who may maintain actions upon them, against the vendor and his heirs. *Middlemore v. Goodall*, 1 Rol. Abr. 521. *Spencer v. Boyes*, 4 Ves. 370. And *cestuis que trust* are entitled to the benefit of all covenants entered into by persons selling lands, for securing the title of such lands. Sugd. Law Vend. 409. *Derisley v. Custance*, 4 T. R. 75. Covenants for the title have been restrained for upwards of a century to the acts of the vendor and his ancestors, and of all persons claiming under them: and although, where covenants are several and of distinct natures, it has been held, that restrictive words annexed to one of the covenants shall not control the generality of the others, though they all relate to the same land, 3 Lev. 47. *Hughes v. Bennett*, Cro. Car. 495. S. C. T. Jo. 403. *Crayford v. Crayford*, Cro. Car. 106; yet, where all the covenants have the same object, and restrictive words are inserted in the first of them, they will be construed as extending to all the covenants, although they are distinct. 3 Lev. 46. Thus, in the case of *Browning v. Wright*, 2 Bos. & P. 13. where a vendor, who claimed an estate in fee by purchase, sold the estate, and covenanted that, notwithstanding any act done by him to the contrary, he was seised in fee, "and that he had good right, &c." to convey to the vendee, and his heirs and assigns, in manner aforesaid; and the vendee was evicted by a person claiming under a title paramount to that of the vendor; though it was contended on the part of the plaintiff, in an action of covenant brought by the vendee against the representatives of the vendor, that the words "good right," &c. extended to all persons whatever, and, consequently, that the vendee was entitled to recover his purchase money; yet the court held that these words were either a part of the preceding special covenants, or, if not, that they were qualified by all the other special covenants, which restrained the covenants to the acts of the vendor and his heirs, and those claiming under him. Et vid. 3 Bos. & P. 574. *Peles v. Jervies*, Dyer, 240. Cro. Jac. 615. pl. 6. *Broughton v. Conway*, Dyer, 240. Mo. 58. cited 8 East, 89. But where releasors covenanted that, "for and notwithstanding any act, &c. by them, or any or either of them done to the contrary," they had good title to convey certain lands in fee; and also that they or some or one of them, "for and notwithstanding any such matter or thing as aforesaid," had good right, &c. to grant; and likewise that the releasee should "peaceably and quietly enter, hold, and enjoy the premises granted, without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever;" and that the releasee should be kept harmless and indemnified by the releasors and their heirs against all other titles, charges, &c. "save and except the chief rent" issuing and payable out of the premises to the lord of the fee. The court held, that the generality of the covenant for quiet enjoyment against the releasors and their heirs, and any other person or persons whatsoever, was not restrained by the qualified covenants for good title and right to convey for and notwithstanding any act done by the releasors to the contrary. *Howell v. Richards*, 11 East, 633. And where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent. Thus, if I covenant that I have a lawful right to grant, and that you shall enjoy, notwithstanding any claiming under me; these are two several covenants, and the first is general, and not qualified by the second; the one covenant goes to the title, and the other to the possession. *Norman v. Foster*, 1 Mod. 101. Et vid. *Gainsford v. Griffith*, 1 Saund. 58. 1 Sid. 328. 2 Bos. & P. 23—25. So, where the assignor of certain shares in a patent right covenanted that he had good right, &c. to convey the shares, and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had over the same; it was held, that the generality of the former words of the covenant was not restrained by the latter. *Hesse*

v. *Stevenson*, 3 Bos. & P. 565. And Lord Alvanley observed, that the omission of the usual words "for and notwithstanding any act by him done to the contrary," was almost of itself decisive. And that the court ought not to indulge parties in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly introduced. *Ibid.* Et vid. *Barton v. Fitzgerald*, 5 East, 530. And as, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other hand, a preceding general covenant will not enlarge a subsequent limited covenant, *Trenchard v. Hoskins*, Winch. 91. 1 Sid. 328. 2 B. & P. 19. It should, however, be observed, that although general covenants will not be cut down, unless the intention of the parties clearly appears. *Cooke v. Fownder*, 1 Lev. 40. 1 Keb. 95. *Proctor v. Johnson*, Yelv. 175. Cro. Eliz. 809. Cro. Jac. 233; yet if general covenants are entered into contrary to the intention of the parties, equity will afford relief. *Coldcott v. Hill*, 1 Ch. Chanc. 15. *Fielder v. Studly*, Finch. 90. 2 Bos. & P. 26. 3 Bos. & P. 575. Sugd. Law Vend. 420—427. The principle of the doctrine, that, where the vendor has himself purchased the estate, the covenants shall be restrained to his own acts (2 Bos. & P. 22. 3 Pow. Conv. 206. 210.), is thus stated by Mr. Fearn:—Regularly a vendor who purchases lands himself, with proper covenants from those who convey to him, cannot reasonably be required to covenant further than against himself, and those claiming under him. This is a practice founded in reason, where the vendee obtains the full benefit of all the covenants in the conveyance to the vendor, to the same extent as his vendor had them, by obtaining the possession of the deeds containing those covenants. When the vendor has parted with his means of claim or remedy against his grantor for breach of his covenants, and transferred them to the purchaser, by delivery of the deeds, and such vendee comes into the vendor's place, in that respect, by the acquisition of such deeds, it would be unreasonable that the vendor should make himself liable for any such breach. He, by departing with the means of remedy or compensation, must be understood to have discharged himself from, and the vendee by accepting those means, to have taken upon himself the peril or risk of such breach, and the duty of enforcing its remedy or compensation. Fearn's Post. Works, 110. Mr. Fearn, however, thought, that where the vendor retains the title deeds, he is bound to enter into covenants extending to the acts of the persons against whose acts he is indemnified by the deeds in his possession, see *The Lord Buckhurst's case*, 1 Co. 1; but he also thought these covenants should be qualified by the insertion of a covenant on the part of the purchaser, that in case any claim should be made under the vendor's covenants against the acts of the former owner, and he (the vendor should produce the deeds, in order to enable the purchaser to avail himself of the covenants contained in them, then no advantage should be taken of the vendor's covenants. This however is a distinction never attended to in practice: if a vendor is entitled to retain the title deeds on account of their relating to a larger estate than the one sold or otherwise, he enters into the usual covenant for the production of them, but never enters into more extensive covenants for the title on account of his retaining the deeds. Sugd. Law Vend. 329. Where a vendor does not claim by purchase in the vulgar and confined acceptation of that word (2 Bl. Com. 241); that is, by way of bargain and sale for money, or some other valuable consideration, a purchaser is entitled to require covenants from such vendor, extending to the acts of the last purchaser. For instance, if I sell an estate which was devised to me, and the deviser's father purchased the estate, the covenants for title are extended to the acts of the father. See 3 Pow. Conv. 206. 210. And a person claiming under a voluntary conveyance, is considered in the same light as a devisee. So a person, whose estate is sold under an order of a court of equity, or by a trustee to whom he has conveyed it upon trust to sell, is bound to covenant for the title in the same manner as he must have done if he himself had sold the estate. But, although the universal and settled practice of conveyancers is, to extend covenants for the title to the acts of the last purchaser, yet the court of chancery appears to hold, that a person not claiming by purchase is only bound to covenant against his own acts, and those of the person immediately preceding him. See 3 Atk. 267. 3 Ves. jun. 236. Though the rule established by practice, Mr. Sugden observes, is undoubtedly the most reasonable, as every purchaser is certainly entitled to a regular chain of covenants for the title. Law Vend. 330. With respect to the persons who are held to claim through the vendor, it has been determined, that a person, whose title was derived under a deed of revocation and appointment of new uses, must be considered as a person claiming by or through the appointor. *Hurd v. Fletcher*, Dougl. 43. And where a vendor covenanted for quiet enjoyment, quietly and clearly acquitted of and from all grants, rents, rent-charges, &c. whatsoever, it was held to extend to an annual quit-rent, payable to the lord of the manor, and incident to the tenure of the lands sold, although there was no arrear of the rent

due. *Hammond v. Hill*, Com. 180. And a covenant for quiet enjoyment against any interruption of, from, or by, the vendor or his heirs, or any person whomsoever, legally or equitably claiming, or to claim any estate, &c. in the premises, by, from, under, or in trust for him, or them, or by, through, or with his or their acts, means, *default*, privity, consent, or procurement, was adjudged to extend to an arrear of quit-rent due at the time of the conveyance, although it was not shown that the rent accrued during the time the vendor held the estate. *Howes v. Brushfield*, 3 East, 491. Where the vendor retains the title deeds, the purchaser will be entitled to a covenant for the production of them : which, being a real covenant, will run with the land, and descend to all future purchasers. *Fearn*, Id. 114. But if the deed, containing such covenant, be not delivered to a future purchaser, he will be entitled to a new covenant from his vendor for the production of the title deeds. *Napper v. Allington*, 1 Abr. Eq. 166. Where there is a defect in the title, the purchaser has a right to covenants against all persons, claiming a lawful title to the estate. And where a purchaser consents to take a defective title, relying for his security on the vendor's covenant, this should be particularly mentioned to be the agreement of the parties : for otherwise, as the defect was known, it may be contended, that the covenants for the title should not extend to warrant it against such particular defect. 4 Cru. Dig. 87.

With respect to the remedies under these covenants, if the purchaser is evicted by any person claiming under the vendor, or any of his ancestors, he may maintain an action at law upon the covenant for damages. And, where a defect is discovered in the title, which can be supplied by the vendor, the purchaser may file a bill in equity for a specific performance of the covenant for further assurance. And a vendor who has sold a bad title will, under this covenant, be compellable to convey any title he may have subsequently acquired, though he purchased such title for a valuable consideration. *Taylor v. Debar*, 1 Ch. Ca. 274. 2 Ch. Ca. 212. *Seabourne v. Powell*, 2 Vern. 211. So, if the vendor become bankrupt, the purchaser may call upon his assignees to execute further assurances, although the vendor was only tenant in tail, and did not suffer a recovery. *Pye v. Daubuz*, 3 Bro. C. C. 595. But it has been determined, that an action of *covenant* does not lie against a devisee upon the statute of fraudulent devises, 3 W. & M. c. 14. the remedy given by that statute being confined to cases where an action of debt lies. *Wilson v. Knubley*, 7 East, 127. An action for breach of a covenant for title, will not be barred by the bankruptcy and certificate of the covenantor, although the cause of action accrued before the bankruptcy. *Hammond v. Toulmin*, 7 T. R. 612. *Mills v. Auriol*, 1 H. Bl. 433. 4 T. R. 94. Where there is any fraud or concealment practised by the vendor, the purchaser may bring an action on the case, in the nature of an action of deceit. But, as a judgment obtained after the death of the vendor, in an action of this kind, can only charge his personal property as a simple contract debt, and will not, except under very particular circumstances, affect his real assets ; a bill in chancery will, in most cases, be found a better remedy ; it will lead to a better discovery of the concealment, and the circumstances attending it ; and may, in some cases, enable the court to create a trust in favour of the injured purchaser. It has been observed, that the circumstance of a court of equity requiring the vendor, in such case, to be affected with such fraudulent concealment, raises a strong presumption, that without proof of it, the purchaser could not have been relieved. 1 Fonbl. Tr. Eq. b. 1. c. 5. s. 8. And in the case of *Harding v. Nelthorpe*, (Nels. Ch. Rep. 118. 2 Ab. Eq. 678, pl. 1.) such proof was required, and an issue was directed, to ascertain whether the vendor did or did not know of the incumbrance, which affected the land, but to which his covenant did not extend. The court of chancery, however, will not compel the performance of a covenant for further assurance, unless the transaction be free from all objection. *Johnson v. Nott*, 1 Vern. 271. If the express covenants for the title be not broken, the purchaser's money cannot be recovered back at law. *Bree v. Holbeck*, Doug. 654. And a court of equity proceeds, in cases of this kind, upon the same principle as a court of law : for, unless there is fraud in concealing the defect in the title, the court will not interfere. See 1 Fonbl. Tr. Eq. 379. n. (h). *Urmston v. Pate*, in Ch. 1st Nov. 1794.

With respect to the persons who are bound to enter into these covenants, it may be observed in general that all persons, who convey lands whereof they are seised to their own use, are bound to enter into the usual covenants for the title of the lands conveyed. But where an estate is sold by trustees under a will, and the money is to be applied in payment of debts, &c. and the residue is given over, a purchaser is not entitled to any covenants for the title, because no line can well be drawn as to the *quantum* which would make a person liable to covenant ; and, therefore, if this rule were not settled, a person who only took *5l.* might as well be required to covenant, as one who took a large sum. *Wakeman v. Duchess of Rutland*, 3 Ves. jun. 233. 504. affirmed in Dom. Frc. 8 Bro. P. C. 145. Et vid. *Lloyd v. Griffith*, 3 Atk. 264. The same rule applies, where an estate is sold for similar purposes

under an order of a court of equity. 3 Ves. jun. 505, 506. In both these cases, therefore, the purchaser is only entitled to a covenant from the vendors, that they have done no act to incumber the estate. But it has always been, and still is, the practice of the profession, to make all the *cestuis que trust*, whose shares are in anywise considerable, join in covenants for the title, according to their respective interests. Sugd. Law Vend. 331. In conveyances by the crown, a purchaser is not entitled to any covenants for the title; and where an estate is sold by assignees of a bankrupt, the purchaser is only entitled to a covenant from the assignees, that they have done no act to incumber. But the bankrupt usually enters into covenants for the title: and he is always made a party to the conveyance of his estate, to prevent the difficulty which the purchaser might otherwise experience in proving the title. Idem, 333.

As to covenants in general, see Shep. Touch. c. 7. p. 160. Com. Dig. tit. Covenant. Selw. N. P. chap. 13. That a covenant can only be created by deed, but it may as well be by deed-poll, (the party being named in the deed, *Green v. Horne*, 1 Salk. 197.) as by indenture, see 1 Roll. Abr. 517. Fitz. N. B. 145: and where lands are conveyed by indenture to two persons, and one of them does not seal the deed, yet if he enters upon the land, and accepts the deed in other matters, he will be bound by the covenants contained in it. Ant. 230 b. p. 230. That no technical words are necessary to the creation of a covenant, but that any words, which show the intention of the parties to enter into a covenant, will be sufficient for that purpose, see 1 Ves. 316. *Hollis v. Carr*, 2 Mod. 86. *Williamson v. Codrington*, 1 Ves. 511. That covenants are to be construed according to the obvious intention of the parties, as collected from the whole context of the instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense of the words, see Plowd. 399, cited in *Iggulden v. May*, 7 East, 241: and if there be any ambiguity, then such construction shall be made as is most strong against the covenantor; for he might have expressed himself more clearly. *Flint v. Brundon*, 1 N. R. 78. That, in respect of joint and several covenants, it has been determined, that if two lessees covenant jointly and severally at the beginning of a lease, these words extend to all their subsequent covenants, notwithstanding the intervention of covenants on the part of the lessor, see *Duke of Northumberland v. Errington*, 5 T. R. 522. And where a person covenants with two or more persons, and with each of them, if each of the covenantees takes a several interest or estate, the covenant is several. But where the interest is joint, the word "each" makes no difference, and does not constitute a separate covenant. *Slingsby's case*, 1 Co. 119. *Duke of Northumberland v. Errington*, supra. *Anderson v. Martindale*, 1 East, 497. And in a late case it was held, that a covenant with two and every of them was joint, though the two were several parties to the deed. *Southcote v. Hoare*, Bart. 3 Taunt. 89. For there is a great deal of difference between covenants where the parties covenant jointly and separately, and where they covenant with them and every of them: in the former case the covenantees clearly have separate actions. *Per* Lawrence, J. Id. 90. That covenants real, which are those that have for their object something connected with land, and are said to run with the land, as they descend to the heir, and are transferred to the purchaser by the conveyance, bind all claiming under the grantor or lessor, both his real and personal representatives, see ante, 384 b. p. 308. 1 Rol. Abr. 521. Cro. Car. 503. 505. Sir W. Jones, 406. *Spencer's case*, 5 Co. 17 a. *Palmer v. Edwards*, Doug. 186. And a court of equity will give its assistance to an assignee against all persons claiming under the grantor of an estate, to procure to him the benefit of the covenants contained in the grant, which run with the thing granted. *Holmes v. Buckley*, 1 Abr. Eq. 27. So, on the other hand, where a covenant is entered into by the grantee or lessee, which relates to the land, it will in like manner run with the land, and charge the representatives or assignees of such grantee or lessee; and the grantor or lessor, or their heirs, may at any time bring an action on such covenant. *Gibb. Law of Cov. c. 11. Ante*, 215 a. b. p. 88, 89. It is not, however, sufficient that a covenant is concerning the land; but in order to make it run with the land, there must be a privity of estate between the covenanting parties. *Per* Lord Kenyon, *Webb v. Russell*, 3 T. R. 393. *Stokes v. Russell*, Id. 678. 1 Hen. Bl. 562. It seems, therefore, that if the estate was, at the time of the conveyance, mortgaged in fee, and the purchaser should enter into a covenant respecting the land with the vendor, the covenant would not bind the assignees of the land, but would be a mere covenant in gross; for the vendor would, in contemplation of law, be a mere stranger, and consequently there could be no privity of estate between him and the purchaser. And even where there is a privity of estate at the time of the covenant, yet if a subsequent purchaser do not take the estate of the original purchaser he will not be bound by the covenant. Sugd. Law Vend. 410. This occurred in the late case of *Roach v. Wadham*: where an estate was conveyed to such uses as the purchaser should appoint; and in default of appointment, to himself in fee, yielding and paying to the vendors, their heirs

CHAP. XXXVI.*

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OF THE SEVERAL KINDS OF DEEDS OR CONVEYANCES. AND FIRST
OF A FEOFFMENT AND LIVERY OF SEISIN.

FEOFFMENT is derived of the word of art *feodum, quia est donatio feodi* (A); for the ancient writers of the law called a feoffment ^{9 a.} Definition of a feoffment.

and assigns, a perpetual fee-farm rent, which rent the purchaser, for himself, his heirs and assigns, covenanted to pay; the estate was afterwards conveyed to a purchaser; as it was holden that the purchaser was in under the power, and not by virtue of the first purchaser's estate, it was admitted on all hands, that an action brought against him by the original vendor, for the fee-farm rent, was not maintainable, for he had not the estate of the first purchaser, but took as if the original conveyance had been made to himself. 6 East. 289. And where a covenant is to do a thing collateral to the land, it does not run with the land, for it will not enure to the assignee, though named. *Mayor of Congleton v. Pattison*, 10 East. 130. *Collison v. Lettson*, 6 Taunt. 229. It should also be observed, that although the assignee be liable to the covenants which run with the land, yet that circumstance will not discharge the assignor, who will still continue liable to them. *Barnard v. Godscall*, Cro. Jac. 309. Therefore a lessee cannot plead to an action of covenant for rent, an assignment, and tender by the assignee. *Orgill v. Kemshed*, 4 Taunt. 642. And it has been held, that there is not any distinction in this respect between a voluntary assignment by the lessee and a compulsory assignment by virtue of the bankrupt laws. *Auriol v. Mills*, 4 T. R. 94. But by the late statute 49 Geo. 3. c. 121. s. 19. it is enacted, that where a bankrupt is entitled to any lease, and the assignees shall accept the same as part of his estate, the bankrupt shall not be liable to pay the rent accruing due after such acceptance of the same, nor be sued in respect of any subsequent non-performance of the covenants and agreements therein contained. If the tenant be not assignee of the whole term, he is then in fact only an under-tenant, and is not liable to any action of covenant. *Holford v. Hatch*, Doug. 182. Et vid. *Derby (Earl) v. Taylor*, 1 East. 502. And it has been determined that the devisee of an equitable estate is not liable as assignee. *The Mayor, &c. of Carlisle v. Blamire*, 8 East. 487. As to implied covenants, see ante, p. 253, 253. n. (κ).

The last part of a deed is the conclusion, which mentions the execution of the deed, and the date either expressly, or by reference to some day and year previously mentioned.—[Ed.]

(A) The general nature of deeds having been explained, we now come to consider their several species, together with their respective incidents and qualities. All deeds by which lands or tenements may be conveyed, derive their effect, either from the common law, or from the statute of uses. Of conveyances by the common law some may be called original or primary, which are those by means whereof the estate is originally created or arises: others are derivative or secondary, whereby an estate, already created, is enlarged, restrained, transferred, or extinguished. Original conveyances are, 1. Feoffments; 2. Gifts; 3. Grants; 4. Leases; 5. Exchanges; 6. Partitions. Derivative conveyances are, 1. Releases; 2. Confirmations; 3. Surrenders; 4. Assignments; 5. Defeazances. A third class which are used not to convey, but to charge lands, and to discharge them again, are, 1. Bonds; 2. Recognizances; 3. Defeazances on Bonds. 4 Crm. Dig. 100, 101.

A feoffment, which is evidently taken from the *breve testatum* of the feudal law, originally signified the grant of a feud or fee, but by custom it came afterwards to signify a grant of a free inheritance to a man and his heirs; respect being had rather to the perpetuity of the estate granted, than to the feudal tenure. Mad. Form. Dissert. 4. A feoffment can only be made of corporeal hereditaments of which the actual possession may be delivered to the feoffee: for which reason corporeal hereditaments are said to be things that lie in livery, *Infra*, 9 a. This mode of conveyance, although it might formerly have been made by word without any writing, yet was usually made by writing; and it was then called a deed, or charter of feoffment. Shep. Touch. 203. But the mere signing and sealing a deed of feoffment was not sufficient to pass an estate of freehold, unless it was accompanied with a formal delivery of the possession, which was called livery of seisin; without which the feoffee had but an estate at will. Post, 48 a. This livery of seisin is no other than the pure

For the antiquity of Feoffments, see the second part of the Institutes, Marlebridge, ca. 9. 8 E. 3. 24. 18 H. 6. 14. 39 H. 6. 39.

(*) Genesis 22.

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(*) Vld. sect. 57. Britton, cap. 34. 44 E. 3. 41. See more of Feoffments, sect. 60. See of Factum, sect. 259.

*9 b.

36 a.

9 a.

Its nature and operation.

(a) Vld. sect. 59 & 66.

(b) Mirror, cap. 2. sect. 15. & cap. 6. sect. 1. Bract. lib. 2. fol. 63. 363. Fleta, lib. 3. cap. 1. 2. 15. Britton, 84. 87. a. & fol. 63. 101. 102. 141. 142. agreeth here.

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donatio, of the verb *do* or *dedi*, which is the aptest word of feoffment (1). And that word Ephron used (*), when he infeoffed Abraham, saying, I give thee the field of Machpelah over against Mamre, and the cave *therein I give thee, and all the trees in the field and the borders round about; all which were made sure unto Abraham for a possession, in the presence of many witnesses.

By a feoffment the corporeate fee is conveyed, and it properly betokeneth a conveyance in fee, as our author himself saith (*), in his Chapter of Tenant for Life. And yet sometimes improperly it is called a feoffment when an estate of freehold only doth pass: *done est nosme general plus que n'est feoffment, car done est general a tous choses moebles et nient moebles, feoffment est riens forsque del soyle*. And note, there is a difference *inter cartam et factum*; for *carta* is *intended a charter which doth touch inheritance, and so is not *factum*, unless it hath some other additions (2).

A deed of feoffment is properly called *charta feoffamenti* (3), and yet if such a deed be denied, the plea is *non est factum*.

Littleton (sect. 1.) saith, "*In all feoffments and grants.*" Here he giveth the feoffment the first place, as the ancient and the most necessary conveyance, both for that it is solemn and public, and therefore best remembered and proved, (a) and also for that it clear-eth all disseisins, abatements, intrusions, and other wrongful or defeasible estates, where the entry of the feoffor is lawful (b), which neither fine, recovery, nor bargain and sale by deed indented and inrolled doth. And here is implied a division of fee, or inheritance, viz. (b) into corporeal, as lands and tenements which lie in livery, comprehended in this word feoffment, and may pass by livery by deed, or without deed, which of some is called *hereditas corporata*, and incorporeal, (which lie in grant, and cannot pass by livery, but by deed, as advowsons, commons, &c. and of some is called *hereditas incorporata*, and by the delivery *of the deed, the freehold, and inheritance of such inheritance, as doth lie in grant, doth pass) comprehended in this word Grant. And the deed of incorporate

(1) See more as to the word *feoffment*, in Mad. Form. Angl. Dissert. p. 3. 2 Inst. 110.—[Hargr. n. 5. 9 a.]

(2) See further as to the distinction between *charters* and *deeds*, and the various other names of writings before and since the

Conquest, in Mad. Form. Angl. Dissert. p. 2. and Mad. Hist. Exch. Pref. Ep. p. 8.—[Hargr. n. 1. 9 b.]

(3) For the formal parts of a deed of feoffment, see ant. 6 a. (p. 240.) [Hargr. n. 2. 36 a.]

feudal investiture, and was adopted in England for the same reason, namely, that the proprietor of each piece of land should be publicly known, in order that the lord might be always certain on whom he was to call for the military services that were due for the land; and that strangers might know against whom they were to bring their præcipes. 5 Co. 84 b. Plowd. 302. 2 Bl. Com. 311. With respect to the operation of a feoffment, see infra, 9 a. and the note there.—[Ed.]

(b) And it turns all other estates into rights, so that a fine levied by the feoffor to the feoffee, or by the latter to a stranger, will bar them, if not avoided within the time prescribed by the statute. Watk. Conv. 95. 2 Bl. Com. 375. 2 Lev. 52. See further as to the advantages of this mode of conveyance, infra, 49 a. and the notes there.—[Ed.]

inheritances doth equal the livery of corporate. And therefore Littleton saith, in all feoffments and grants, *hæreditas, alia corporalis, alia incorporalis: corporalis est, quæ tangi potest et videri; incorporalis, quæ tangi non potest, nec videri.*

with. Pl. Com. 171. Hill & Grange. Mirror. ca. 5. sect. 1. Britton, cap. 34.

AND it is to be understood, that in a lease for years, by deed or without deed (4), there needs no livery of seisin (c) to be made to the lessee, but he may enter when he will by force of the same lease. But of feoffments made in the country, or gifts in tail, or lease for term of life; in such cases where a freehold shall pass, if it be by deed or without deed, it behoveth to have livery of seisin.

LITTLETON. [Sect. 59. 48 a.] 1. Livery of seisin necessary to a feoffment.

"Livery of seisin." (5) *Traditio* or *deliberatio seisinæ*, is a solemnity, that the law requireth for the passing of a freehold of lands or tenements by delivery of seisin thereof. (c) *Intervenire debet solennitas in mutatione liberi tenementi, ne contingat donationem deficere pro defectu probationis* (6).

48 a. 18 E. 3. fol. 16. 41 E. 3. 17. 40 Ass. 10. 2 Ass. 1. 2 E. 3. 4. 43 E. 3. Feoff. 51. Pl. Com. 25 a. & 303 b. Vid. sect. 66. (Ante, 216.) (c) Bracton, lib. 2. c. 15. (385)* Livery in deed defined. (d) Bracton, lib. 2. cap. 15.

*And there be two kinds of livery of seisin, viz. a livery in (d), deed, and a livery in law. A livery in deed is when the feoffor taketh the ring of the door, or turf or twig of the land, and deliver-

(4) See ant. vol. 1. p. 630. n. (6).

(5) For the origin and history of the transfer of lands by livery of seisin, see 2 Bl. Com. 311. Mad. Form. Angl. Dissert. 9. and Spelm. Gloss. and Du. Fresn. Gloss. voce. *Inestitura*.—[Hargr. n. 2. 48 a.]

(6) But since the introduction of uses and trusts and the statute of 27 H. 8. for transferring the possession to the use, the necessity of livery of seisin for passing a freehold in corporeal hereditaments has been almost wholly superseded, and in consequence of it the conveyance by feoffment is now very little in use. Before the statute of uses *equitable* estates of freehold might be created through the *medium* of trusts without livery, and by the operation of the statute *legal* estates of freehold may now be created in the same way. Those who framed the statute of uses evidently foresaw, that it would render livery unnecessary to the passing of a freehold, and that a freehold of such things as do not lie in grant would become transferable by *parol* only, without any solemnity whatever. To prevent the inconveniences which might arise from a mode of conveyance so uncertain in the proof, and so liable to misconstruction and abuse, it was enacted in the same session of parliament, that an estate of freehold should not pass by bargain and sale only, unless it was by indenture in-

rolled. See 27 H. 8. c. 16. The objects of this provision evidently were, first, to force the contracting parties to ascertain the terms of the conveyance by reducing it into writing; secondly, to make proof of it easy by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances by substituting the more effectual notoriety of inrolment for the more ancient one of livery. But the latter part of this provision, which, if it had not been evaded, would have introduced almost an universal register of conveyances of the freehold in the case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from the omission to extend the statute to bargains and sales for terms of years; and the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold though created without deed or writing. The inconveniences from this insufficiency of the statute of inrolments are now in some measure prevented by the 29 Ch. 2. c. 3. which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. See post, 111 b.—[Hargr. n. 3. 48 a. (310).]

(c) Seisin is a technical term, to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. *Per* Lord Mansfield, 1 Burr. 107.—[Ed.]

& 18. Brit. cap. 33. in fine fol. 37. Fleta, lib. 3. cap. 13.

eth the same upon the land to the feoffee in name of seisin of the land, &c. *per hostium et per haspam et annulum vel per fustem vel baculum, &c.*

(e) 6 Co. 26. Sharp's case. May be made by a solemn act and words;

A. seised of an house in fee, and being in the house, (e) saith to B., I demise to you this house for term of my life; this is a good beginning to limit the state, but here wanteth livery (7). A livery in deed may be done two manner of ways. By a solemn act and words; as by delivery of the ring or hasp of the door, or by a branch or twig of a tree, or by a turf of the land, and with (f) these or the like words, the feoffor and feoffee both holding the deed of feoffment and the ring of the door, hasp, branch, twig, or turf; and the feoffor saying, Here I deliver you seisin and possession of this house, in the name of all the lands and tenements contained in this deed, according to the form and effect of this deed; or by words without any ceremony or act (8); as the feoffor being at the house door, or within the house, Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed; *et sic de similibus*: or, Enter you into this house or land, and have and enjoy it according to the deed: or, Enter into the house or land, and God give you joy: or, I am content you shall enjoy this land according to the deed; or the like. For if words may amount to a livery within the view, much more shall it upon the land (9). But if a man deliver the deed of feoffment upon the land, this amounts to no livery of the land, for it hath another operation to take effect as a deed: but if he deliver the deed upon the land in name of seisin of all the lands contained in the deed, this is a good livery: and so are other books intended that treat hereof, that the deed was delivered in name of seisin of that land. Hereby it appeareth, that the delivery of any thing upon the land in name of seisin of that land, though it be nothing concerning the land, as a ring of gold, is good, and so hath it been resolved by all the judges; and so of the like.

(f) See of this more sect. 60. (2 Rol. Abr. 7.)

or by words without any act.

41 E. 3. 17 b.

41 Ass. p. 10.

38 Ass. p. 2.

38 E. 3. 11.

39 Ass. p. 12.

26 Ass. 39.

27 Ass. p. 61.

18 E. 3. 16.

6 Co. 26.

Sharp's case.

(Post, 37.

Cro. Jam. 80.)

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43 E. 3. tit.

Feoff. 51.

36 H. 8. Feoff.

Br. (9 Co.

136 b.

1 Leon. 207.)

50 E. 3. Rot.

Parl. nu 30.

49 b. Cannot be without words. Diversity herein as to the delivery of a deed.

Note, there is a diversity between livery of seisin of land, and the delivery of a deed; for, if a man deliver a deed without saying of any thing, it is a good delivery, but to a livery of seisin of land words are necessary; as taking in his hand the deed, and the ring of the door (if it be of an house) or a turf or twig (if it be of land) and the feoffee laying his hand on it, the feoffor say to the feoffee, Here I deliver to you seisin of this house, or of this land, in the name of all the land contained in this deed, according to the form and effect of the deed (as hath been said): and if it be without deed, then the words may be, Here I deliver you seisin of this house or land, &c. to have and to hold to you for life, or to you and the heirs

(7) "9 Rep. 13. *Thoroughgood's case*." Hal. MSS.—[Hargr. n. 4. 48 a.]

(8) "43 Ass. 10. 18 H. 6. 16. A. makes charter of feoffment to uses to B., and B. being on the land, A. says, *I am content, you shall have this house and land according to the*

deed made to you; it is not livery, because it imports only assent and is future. H. 6. Jac. *Maund's case*. Ley n. 3." Hal. MSS.—See Ley 2.—[Hargr. n. 5. 48 a. (311).]

(9) But Cro. Jam. 80. and Ley 2. seem contra.—[Hargr. n. 6. 48 a.]

of your body, or to you and your heirs for ever, as the case shall require.

When the kinsman of Elimelech gave unto Boas the parcel of land that was Elimelech's, he took off his shoe, and gave it unto Boas in the name of seisin of the land (after the manner in Israel) in the presence and with the testimony of many witnesses. And when Ephron infeoffed Abraham of the field of Machpelah, he said to him, *Agrum trado tibi, &c.* I deliver this field to thee (d).

*Albeit the deed be delivered upon the ground, yet doth it not amount to a livery of seisin of the land; for it hath its natural effect to make it a deed. (g) *Donationum alia perfecta, alia incepta et non perfecta: ut "si donatio lecta fuerit et concessa, ac traditio nondum fuerit subsequuta.* But if the deed be delivered in name of seisin of the land, or if the feoffor saith to the feoffee, Take and enjoy this land according to the deed; or, Enter into this land, and God give you joy; these words do amount to a livery of seisin.

AND if a man will make a feoffment, by deed or without deed (ē), of lands or tenements which he hath in divers towns in one county, the livery of seisin made in one parcel of the tenements in one town, in the name of all the rest, is sufficient for all other the lands and tenements comprehended within the same feoffment in all other the towns in the same county (10). But if a man maketh a deed of feoffment of lands or tenements in divers counties, there it behoveth in every county to have a livery of seisin (11).

(10) "Vid. 11 Eliz. Dy. 283. *Cestui que use* of three acres by three several feoffments in one county makes charter of feoffment of all and livery in one of the acres, it is pursuant to the statute and passes all." Hal. MSS.—The statute meant is the 1 R. 3. c. 1. which empowers *cestui que use* to make effectual feoffments and conveyances against his feoffees in trust; and the case cited was of feoffment before the 21 H. 8. for transferring uses into possession. It is stated, that the livery was made by attorney, and that was the cause of the doubt; it being said, by some, that the statute of R. 3. ought to be construed strictly, and to be confined to conveyances made by the *cestui que use* in his

own person. See Bro. *Feoffment to Uses*, 28.—[Hargr. n. 1. 50 a. (323).]

(11) "Vid. Dy. 246. 22 H. 6. 10. If a manor extends into two counties, livery in that part of the manor which is in one county, doth not pass that which is in the other county. So it is with respect to disseisin." Hal. MSS.—But Mr. Perkins holds, that livery of parcel of such a manor in one county will pass the parcel in the other county. Perk. sect. 227. However, he admits, that if one be disseised of two acres in different counties, entry into the acre in one of the counties, though made in the name of both acres, will not extend to the acre in the other county. Perk. sect. 229.—[Hargr. n. 2. 50 a. (324).]

(d) Among the ancient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses. Stiernhook *De jure Sueon*, 1. 2. c. 4. In the times of our Saxon ancestors the delivery of a turf was a necessary solemnity, to establish a conveyance of lands. Hicke's *Dissert. Epistolar*. 85. And, to this day, the conveyance of our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchaser by re-delivery of the same, in the presence of a jury of tenants. 2 Bl. Com. 313. The disuse of livery of seisin, and the want of sufficient notoriety thereby occasioned, have been frequently regretted. See 2 Bl. Com. 337. Bac. *Law Tracts*, 154.—[Ed.]

(e) That is, at common law, before the 29 Cha. 2. c. 3.—[Ed.]

Ruth. cap. 4.
ver. 7, 8.
Deut. 25. 9, 10.

Gen. 23. ver.
11.

(337)*
56 b.

6 Co. 26.
Ante, 48 a.)
(g) *Flet. lib.*
3. cap. 2. &
cap. 16. 43 E.
3. tit. Feof. &
Feita, 51.
36 H. 8. Feof.
Br. 27 Ass.
61. 38 Ass. 2.
39 Ass. 12.
41 E. 3. 17.
6 Co. 26.
Sharp's case.
(Ante, 48 a.)

*57 a.
LITTLETON.
[Sect. 61.
50 a.]

Where the
lands lie in
one county,
livery in
part, in the
name of the
whole, is suf-
ficient:
secus if they
lie in several
counties,

48 b.
How livery
shall be made
of a moveable
fee-simple.
Bridge-
water's case.
(Ante, 4 b.
180 b.)
(338)*
Vid. sect. 1.

Vide Sect. 1. in Bridge-water's case, where a man hath a moveable estate of inheritance, for example there put, in 13 acres: the question is, where livery shall be made. First, if they be parcel of a manor, they may pass by the name of the manor; but if they be in gross, then the charter of feoffment must be of 13 acres lying and being in the meadow of 80 *acres, generally, without bounding or describing of the same in certainty; and livery of the seisin of any 13 acres allotted to the feoffee for a year *secundum formam cartæ* is a good livery to pass the content of 13 acres wheresoever the same lie in that meadow. In the second case, where one entire manor is separate and divided, as is aforesaid, there is no question but the livery must be made of that manor; but in the other case, where two manors are separate, and divided *alternis vicibus*, there the charter of feoffment must be made of both, and livery in that manor which he is seised of in any one year *secundum formam cartæ*, and the next year in the other *secundum formam cartæ*: for there are two distinct manors, and several estates in them (12).

48 a.
Livery of part
secundum
formam car-
tæ, passes all
contained in
the deed;
(Post, 50 a.)
13 E. 3.
Estop. 177.
or if made to
one of several
feoffees,
passes to all;
229 a.
1 E. 3. 17. in
Gracye's
case.

If divers parcels of land be contained in a deed, and the feoffor delivers seisin of one parcel according to the deed, all the parcels do pass, albeit he saith not (in name of all, &c.) because the deed containeth all. And so, if there be divers feoffees, and he make livery to one according to the deed, the land passeth to all the feoffees (13); and yet the plainer way is to say (in the name of the whole, or of all the feoffees) (14).

If a deed be made and dated in a foreign kingdom, of lands within England, yet if livery and seisin be made, *secundum formam cartæ*, the land shall pass, for it passeth by the livery.

48 a.
or if made for
life, the deed
being in fee,
passes the
fee.
lb. (2 Co. 246.
Ante, 222.)
7 E. 4. 25. 29.
40. 10 Ass.
19 Ass.
43 Ass. 20.
(339)*
Where the
deed has no
effect, livery
according to
the deed is
void.
*48 b.
(Holt. 171.)

If a man make a charter in fee, and deliver seisin for life *secundum formam cartæ*, the whole fee-simple shall pass, for it shall be taken most strongly against the feoffor (f). Note, that these words (*secundum formam cartæ*) are understood according to the quantity and quality of the effectual estate *contained in the deed. If a man make a lease for years by deed, and *deliver seisin according to the form and effect of the deed; yet he hath but an estate for years, and the livery is void, as Littleton saith. So, if A. by deed give land to B., to have and to hold after the death of A. to B. and his heirs, this is a void deed, because he cannot reserve to himself a particular estate, and construction must be made upon the whole deed; and if livery be made according to the form and effect of the deed, the livery

(19) "Vid. 8 E. 2. Feoffments 111. Livery by the lord of any part of the manor without going to it; but *contra* if not parcel." Hal. MSS.—[Hargr. n. 3. 48. b (314).]
(13) "But if it be without deed nothing

passes to the others. Dy. 14. 35." Hal. MSS.—[Hargr. n. 7. 48 a.]

(14) "15 E. 4. 18. 18 E. 4. 12. 18 H. 6. 9. 22 H. 6. 1. 40 E. 3. 40." Hal. MSS.—[Hargr. n. 8. 48 a.]

(f) And livery is not only made for life, but also according to the form of the deed, that is, according to the quantity and quality of the estate contained in the deed, which necessarily includes an estate for life. Hawk. Abr. 80. But where the deed and the words used in the livery are inconsistent, nothing passes by the deed. Ante, 222 b. p. 9.—[Ed.]

also is void (a), because the livery referreth to a deed that hath no effect in law, and therefore it cannot work *secundum formam et effectum cartæ* (15). And so it was adjudged, *et sic de similibus*. (*) And it is to be observed, that neither the feoffor being absent can make livery, nor the feoffee being absent can take livery, but by warrant of attorney, by deed (n), and not by parol, because it concerneth matter of freehold (16).

IF a man maketh a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought to have the tenements according to the purport of the said deed, before livery of seisin made; and if there be no livery of seisin, then after the decease of him who made the deed, the right of these tenements is forthwith in his heir, or in some other.

"Attorney" is an ancient English word, and signifieth one that is set in the turn, stead, or place of another: and of these some be private (whereof our author here speaketh) and some be public, as attorneys at law, whose warrant from his master is, *ponit loco suo talem attornatum suum*, which setteth in his turn or place such a man to be his attorney.

"And a letter of attorney to one to deliver to him seisin by force of the same deed." Here first it appeareth, that the authority

(15) "Charter of feoffment *habendum a die datas*, Ruled, 1. If livery be made the same day *secundum formam cartæ*, it is void. 2. If it was after the day by the feoffor himself, it is good. 3. If there be letters of attorney to deliver seisin in the deed, or it was at the same time, and it is delivered after the day, yet it is not good, because the authority was given at a time when it was a void charter. But 4. If letter of attorney be made after the day, and livery is made according to the deed it is good. Hob. 314. *Greenwood and Tiler*. T. 3. Car. *Owen and Price*. C. B. H. 3 Jac. Rot. 216.

B. R. *Hennings and Paucharden*. So, there is a diversity between this and a grant of a reversion *habendum* from a day to come, for attornment after the day doth not aid the grant. 2 Rep. 55. *Buckler's case*." Hal. MSS.—See Cro. Jam. 563. and 153.—[Hargr. n. 1. 48 b. (312).]

(16) "Adjudged, that feoffee being absent cannot take livery, nor feoffor being absent make livery, by attorney by *parol*. T. 1659. *Gregory and Badbourne*. But a lease for years may be delivered by attorney by *parol*, as has been often adjudged." Hal. MSS.—[Hargr. n. 2. 48 b. (313).]

(a) In these two cases the livery of seisin is void, for the first deed expressly gives a chattel only, and the second gives a freehold *in futuro*, and consequently is void: and where the sole purport of the livery is to make the estate contained in the deed effectual, it shall rather be void, than strained to give a freehold in the first case, or a present estate in the second, against the manifest intent of the parties. Hawk. Abr. 80.—[*Ed.*]

(n) A man may either give or receive livery by his attorney: for since a contract is no more than the consent of a man's mind to a thing, where that consent or concurrence appears, it were most unreasonable to oblige each person to be present at the execution of the contract, since it may as well be performed by any other person delegated for that purpose by the parties. But such delegation or authority, to give or receive livery, must be by deed, that it may appear to the court, that the attorney had a commission to represent the parties that are to give or take livery, and whether the authority was pursued. 3 Bac. Abr. 166.—[*Ed.*]

Plowd. 155.
157. 1 Sid. 82.
2 Rol. Abr. 7.
1 Co. 127. 139.
Cro. Ja. 376.
Mich. 33 & 34.
Elliz. in the
King's Bench
inter Hogge
& Crosse for
lands in Lon-
don. Vid. Pl.
Com. 385.
In the case of
livery by at-
torney, the
attorney
must be ap-
pointed by
deed.
(*) See more
of this, sect.
66. 11 H. 4. 71.
19 Ass. 9.
19 H. 8. 9 b.
2 Rol. Abr. 8.
Post. 369.
2 Sid. 61.
LITTLETON.
[Sect. 66.
51 b.]
(340)*
51 b.
(9 Co. 75.
F. N. B. 156.)

52 a.
Vid. sect. 196.

to deliver seisin (as hath been said) must be by deed (17): for *letter of attorney* is as much as a warrant of attorney by deed, for *litteræ* do signify sometimes a deed, as *litteræ acquietancie* do signify a deed of acquittance, and herewith (h) agreeth Britton.

(h) 24 E. 3. 27.
11 H. 7. 13.
Britt. 101 b.
Who may be
attornies to
make livery.

(i) 21 E. 4. 18.
Br. Feoff.
ments 50.
21 H. 6. 30.
13 E. 3. At-
torney 73.

(341)*

2. Littleton here speaks generally to one, and few persons are (i) disabled to be private attornies to deliver seisin; for monks, infants, feme covert (18), persons attainted, outlawed, excommunicated, villains, aliens, &c. may be attornies. A feme may be an attorney to deliver seisin to her* husband, and the husband to the wife, and he in the remainder to the lessee for life (1).

Must pursue
his authority,
both express
and implied.
(k) 12 Ass.
pl. 24. 26 Ass.
39. 11 H. 4. 3.
10 H. 7. 11 H.
7. 3. 40 Ass.
38. (9 Co. 76b.)
27 Ass. 61.
41 Ass. 10.
41 E. 3. 17.
(2 Leon. 73.)

3. It appeareth here that the attorney must (k) pursue his warrant, otherwise he doth not deliver seisin by force of the deed, as Littleton speaketh. Now his authority is two-fold, expressed in his warrant, and implied in law, both which he must pursue. And first of his express authority. A man seised of Black Acre and White Acre makes a deed of feoffment of both, and a letter of attorney to enter into both Acres, and to deliver seisin of both of them according to the form and effect of the deed, and he entereth into Black Acre and delivers seisin *secundum formam cartæ*, this livery and seisin is good, albeit he did not enter into both, nor into one in the name of both; for when he delivereth seisin of one *secundum formam cartæ*, this is tantamount and implieth a livery of both. (19) So, when the feoffment is made to two or more, and the at-

(17) "Vid. 1 Ass. 16. 26 Ass. 29. 35 Ass. 1. 12 H. 7. 27. 13 H. 7. 14. 4 H. 7. 13. 13 E. 4. 8." Hal. MSS.—[Hargr. n. 1. 52 a.]

(18) In another place Lord Coke cites a passage from the Mirror, which excludes both infants and femes covert from being attornies. Post, 128 a. But that is quite reconcilable with the doctrine here; for there *public* attornies for prosecuting suits at law are meant, whose office cannot be properly executed without considerable knowledge and discretion: but here Lord Coke in the first part of the sentence confines himself to *private* attornies to deliver seisin, which is an act so merely ministerial that it may be done by the most ignorant. See the case of *Earle and Greenough*, in 3 Atk. 695. and 1 Ves. 298. One question in that case was, whether a power of disposing of real estate could be well executed by an infant feme covert of the age of nineteen; and Lord Ch. Hardwicke determined against the execution of the power, 1. because he thought in general that *such* a power could not be

well given to an infant, the disability of infancy being stronger than that of coverture; 2. because in the particular case it did not appear, that the power was intended to be given during infancy, the power being given *notwithstanding coverture*, without the least notice of *infancy*; and 3. because it was a power coupled with an interest, the infant having a trust in equity for life, together with the trust of the inheritance subject to the power.—[Hargr. n. 2. 52 a. (332).]

[See ant. vol. 1. p. 174. n. 35. —[Ed.]]

(19) "Adjudged accordingly of livery to one feoffee. T. 1651. B. R. *Trotman's case*. Vid. M. 31, 32 Eliz. C. B. *Trevilian's case*. A. seised of two acres makes lease of one acre to B. for years, and afterwards makes charter of feoffment of both acres and letter of attorney to B. and C. *conjunctim et divisim* to make livery: B. makes livery in one acre and C. in another, and adjudged good. Entered M. 30, 31 Eliz. Rot. 2908. Vide Bendl. n. 15. M. 32, 33 Eliz. 1868." Hal. MSS.—[Hargr. n. 3. 52 a. (333).]

(1) But seisin can be delivered by attorney only when the feoffor is *sui juris*; for, if the feoffor be an infant, feme covert, or the like, livery should be made in person; for as an attorney cannot be constituted but by deed (which these persons are incapable of making, *Zouch v. Parsons*, 3 Burr, 1801.), any act done by them in pursuance of such vacate authority, would of course be wholly void, whilst the effect of a livery made in person will be good until avoided by entry. Perk. sect. 12. 1 Bart. Prec. conv. 47. n. 17.—[Ed.]

torney is to make livery of seisin to both, and the attorney make livery of seisin to one of the feoffees *secundum formam et effectum cartæ*, this is good to both (κ), and yet in that case he that is absent may waive the livery. If lessee for life make a deed of feoffment and *a letter of attorney to the lessor to make livery, and the lessor maketh livery accordingly, notwithstanding he shall enter for the forfeiture (λ). But if lessee for years make a feoffment in fee and a letter of attorney to the lessor to make livery, and he make livery accordingly, this livery shall bind the lessor, and shall not be avoided by him: for the lessor cannot make livery as attorney to the lessee, because he had no freehold whereof to make livery, but the freehold was in the lessor (20). If the lessor make a deed of feoffment and a letter of attorney to the lessee for years to make livery, and he doth it accordingly, this shall not drown or extinguish his term, because he did it as a minister to another (22) and in another's right, and is accounted in judgment of law the act of the other, and the feoffee claimeth nothing by him (23).

(Post. 310 a.
359 a.)

(342)*

Tr. 7 Eliz. in
Com. Banco
(21)
(Mo. 11. Cro.
Jac. 177.)

If one as procurator or attorney to another present to his own benefice, he puts himself out of possession, because he cometh in by the induction and institution of the ordinary. If the tenant devise that the lord shall sell the land, and dieth, and the lord selleth it, the seignory remains. But if the lord or a grantee of a rent-charge had been also *cesty que use* of the land, and after the statute of R. 3. and before the statute of 27 H. 8., *cesty que use* had made a feoffment in fee of the land, albeit the land passeth from the feoffees, and his feoffment is warranted by the power given to him by the

17 E. 2. 61.
(F.N.B.30.)

(1 Co. 111.
Post. 265 b.)

(20) "Yet vide if lessee for years makes feoffment and livery, though lessor be on the land, it seems to be a forfeiture. Dy. 362, 363. 14 H. 7." Hal. MSS.—Hargr. n. 4. 52 a. (334).]

(21) "*Smith's case*." Hal. MSS.—[Hargr. n. 5. 52 a.]

(22) "If A. brings *præcipe* of C's land against B. and recovers, and C. is made sheriff, and *habere facias seisinam* comes to him, he may return the special matter on ac-

count of the mischief. 13 H. 4. 15. 7 H. 6. 33." Hal. MSS.—[Hargr. n. 6. 52 a. (335).]

(23) "So it is of livery by the lord. H. 4 E. 6. Mo. n. 41. *Trevillian's case*, supra." Hal. MSS.—See note 19.—By the case of livery by the lord, it is meant, that if tenant makes feoffment of his tenancy, and the lord as attorney makes livery, it shall not extinguish his seignory. Mo. 11.—[Hargr. n. 7. 52 a. (336).]

(κ) So where a deed of feoffment was made to three, *habendum* to two for their lives, remainder to the third for his life, and a letter of attorney was made to give livery to the two, but the attorney made livery to all three *secundum formam cartæ*; and the question was, whether the livery so made as if they had all estates in possession, whereas in truth one of them had but an estate in remainder, was good: the court were all of opinion, that the livery was good to two for their lives, remainder to the third person. And the chief justice said, that whatever the ancient opinions were about pursuing authorities with great exactness and nicety, yet this matter of livery upon indorsements of writing was always favourably expounded of later times, unless where it plainly appeared that the authority was not pursued at all. As if a letter of attorney was made to three jointly and severally, two could not execute it, because they were not the parties delegated; they did not agree with the authority. *Norris v. Trists*, 2 Mod. 78. S. C. 3 Salk. 277.—[Ed.]

(λ) For the lessee had an estate which might pass by livery, and the lessor who was not privy to the deed, might presume that it contained no greater estate than the lessee could lawfully make; and therefore he ought not to be prejudiced in respect of his right of entry for the forfeiture. Hawk. Abr. 88.—[Ed.]

statute, yet the seignory or rent-charge is extinct by his feoffment, for that he hath not a bare authority as the attorney hath (24) (M).

(343)*

If he does less than his warrant, it is void. (Post, 252 b.)

*52 b.

Diversity herein in case of an authority coupled with an interest.

(1 Rol. Abr. 511.)

(5) Hil. 36 El. Rot. 492. inter Stanton & Barnes, in ejectioe firme, in the King's Bench. (Post, 265 b. 1 Sid. 6.)

*If a man be seised of Black Acre and White Acre, and a warrant of attorney is made to enter into both and to make livery, there if the attorney enter into Black Acre only and makes livery *secundum formam cartæ*, there the livery of seisin is void, because he doth less than his *warrant (25); for the estate of the disseisor in White Acre cannot be divested without an entry. But there is a diversity between an authority coupled with an interest, and a bare authority (26). For example, a custom within a manor time out of mind of man used, was to grant certain lands parcel of the said manor in fee-simple, and never any grant was made to any, and the heirs of his body, for life, or for years; and the lord of the said manor did grant to one by copy for life, the remainder over to another, and the heirs of his body; and it was adjudged (D), that the grant and remainder over was good; for the lord having authority by custom, and an interest withal, might grant any lesser estate: for in this case, the custom that enableth him to the greater, enableth him to the lesser, *Omne majus in se continet minus*. But he that hath but a bare authority, as he that hath a warrant of attorney, must pursue his authority (as hath been said), and if he do less, it is void (27) (N).

(24) See supra, note 23.

(25) "Vid. 11 H. 4. 3. If there be feoffment on condition and letter of attorney to make livery accordingly, and livery is made absolutely, it is void and a disseisin. So *e converso* 12 Ass. 24. 26 Ass. 39.—H. 38 Eliz. B. R. Poph. n. 2. *Slanning's case*. A. seised of the manors of B. and C. and also of a mill in possession of I. S. by force of a lease for years makes charter of feoffment, with letter of attorney to enter into the said manors, and all other the said lands and tenements and seisin thereof to take, and after such possession and seisin taken, such seisin and possession to deliver, &c. according to the form and effect of the deed. The attorney makes livery in the manors of C. and B. but not of the mill, nor doth I. S. attorn. Ruled, that the mill doth not pass, but that the livery of the manors was well executed." Hal. MSS.—[Hargr. n. 9. 52 a (337).]

(26) See post, 49 b. ante, 113 a. vol. 1. p. 398, 399. and 181 b. vol. 1. p. 738.

(27) "Vide these diversities. A. makes letter of attorney to B. C. and D. *conjunctim*

& *divisim* to make livery. If two make livery it is void, because it is neither *conjunctim* nor *divisim*. 27 H. 8. 6. But if one makes livery in one parcel, and another in another parcel, it is good. M. 31, 32 Eliz. *Trevillian's case*. But if two make livery in presence of the third, he not saying any thing, it seems good. Dy. 63. But if authority be to six or any two of them to do an act, there, if it be done by three, it is good. 5 Rep. 91. *Hoe's case*. So, where one devised, that his executors or any one of them might sell his land, and made three executors, and one died, and the other two sold, it was ruled good; for it is not so strict as *conjunctim* & *divisim*. M. 37, 38 Eliz. C. B. the case of *Townsend and Whales*. But if warrant be by sheriff to three bailiffs *conjunctim* & *divisim*, execution by two is good, because it is the execution of justice. M. 44, 45 Eliz. *King and Hobbs*." Hal. MSS.—See ante, 52, note 19, to which part this note more properly belongs. See also infra, note 30.—[Hargr. n. 2. 52 b. (338).]

(M) The statute of 1 R. 3. c. 1, empowered *cestui que use* to make effectual conveyances and feoffments against his feoffees in trust; and therefore in the case put by Lord Coke, though the land passed from the feoffees, yet the *cestui que use* acted not by a bare authority derived from them; but his conveyance was made good by the statute: and it is a rule, that wherever the feoffor has any interest, rent, common, &c. in, to, or out of the land, it is extinguished by the feoffment. Plowd. 423, 424. Shep. Touch. 204.—[Ed.]

(N) To prevent the inconvenience which would arise from the death, illness, &c. of the

*A man make a lease for life, and after make a charter of feoffment, with a letter of attorney to deliver seisin, the attorney enters upon the lessee, this is sufficient to convey away the reversion; for that (28) (it may be said once for all) livery of seisin being to perfect the common assurance of lands, is always expounded favourably, *ut res magis valeat quam pereat*. All this was adjudged and (m) resolved by a court of common pleas, and after affirmed by all the judges of the kings bench, in a writ of error.

Now the authority of an attorney, implied in the law, is, though the warrant be general, to deliver seisin; yet the attorney cannot deliver seisin within the view, for his warranty is intendable in law of an actual and express livery, and not of a livery in law, and so hath it been resolved (29) (o). See more hereof here next following.

"Yet if livery of seisin be not executed in the life of him which made the deed." Here, albeit the warrant of attorney be indefinite, without limitation of any time, yet the law prescribeth a time, as Littleton here saith, in the life of him that made the deed; but the death not only of the feoffor, of whom Littleton speaketh, but of the feoffee also, is a countermand in law of the letter of attorney, and the deed itself is become of none effect, because in this case nothing doth pass before livery of seisin (p). For if the feoffor dieth, the land descends to his heir, and if the feoffee dieth, livery cannot be made to his heir, because then he should take by purchase,

(344)*
2 & 3 Ph. &
Mar. Dyer,
131. 17 El.
Dyer, 40.
(Mo. 91. 2
Sid. 65.
2 Leon. 19.
Ante 48 b.)
(m) Pasch.
31 El. Rot.
514. in Com.
Banc. inter
Carter, pl. &
Claypole &
al. def. In
ejectione fir-
mae, et in
brieve de er-
ror. Hil. 32
Eliz. Rot. 791.
The attorney
cannot make
livery within
the view.
Pasch. 3 El.
in Com. Banc.
in Yarham's
case.
Cannot make
livery after
the death of
the feoffor or
feoffee.
22 H. 6. 6.

(28) "So such attorney may deliver seisin with assent of lessee for years, he being on the land. Adjudged P. 1651. B. R. *Wegg*

and *Villers*." Hal. MSS.—See post, 48 b. —[Hargr. n. 3. 52 b. (339).]

(29) "Dy. 233. *Sir Walter Deny's case*." Hal. MSS.—[Hargr. n. 5. 52 b.]

attorney appointed to deliver seisin, two persons are sometimes named for this purpose, in which case they should be appointed "jointly, and each of them severally," for otherwise, as every bare authority, not clothed with an interest, must be strictly pursued, livery made by one of them alone would be void. 1 Bart. Prec. Conv. 47. n. 17.—[Ed.]

(o) And an attorney cannot make a letter of attorney to another to give livery. 18 E. 4. 12 b. 19 H. 8. 10. 2 Rcl. Abr. 9. Sheph. Touch. 218 n.—[Ed.]

(p) If either of the parties die before the livery of seisin be made, the feoffment is void, and no warrant of attorney to make livery can be executed after the death of the feoffor or feoffee, neither is there any remedy in this case to get the assurance made perfect but in a court of equity; which has in some cases supplied the want of livery. *Burgh v. Francis*, Finch. 28. A court of equity will presume livery of seisin to have been made, though not indorsed on the deed, where the possession has gone according to the feoffment for a great length of time. *Jackson v. Jackson*, Fitzg. 146. Sel. Ca. Ch. 81. *Bakenham v. Bakenham*, 1 Ch. Ca. 240. And it seems, that, at law, livery of seisin would be presumed after the expiration of twenty years, as possession for that length of time would bar a possessory action. See *Rees, d. Chamberlain v. Lloyd*, Wightwick, 123. 2 Prest. Conv. 305. 309. Where a conveyance, which is defective for want of livery, is aided in equity, it will be discharged of meane incumbrances by the party; as if a mortgage wants livery, and thereupon the heir confesses judgment to another, the mortgagee shall be released from the judgments. *Burgh v. Burgh*, supra. But where there are many feoffees, there the death of one or some of them will not hinder the livery, but it may be made to the survivors. *Infra*, n. 30. As to the assistance afforded by a court of equity in aid of a defective conveyance, see Com. Dig. Chancery, (3 T.) Copyhold, (P 2.) Eq. Ca. Abr. Deeds, (D.) Vin. Abr. Fairs, (T. a.)—[Ed.]

Bract. lib. 2.
fol. 16. 40
Ass. pl. 33.
29 H. 6. 7 a.
14 E. 4. 2.
18 E. 3. 16 b.
11 H. 7. 13 &c.

where heirs were named by way of limitation (30). And here-with agreeth Bracton, *Item oportet quodd donationem sequatur rei traditio, etiam in vita donatoris et donatorii*. Therefore a letter of attorney to deliver livery of seisin after the decease of the feoffor is void (31).

Fourthly, in all cases the attorney must pursue the warrant in substance and effect that he hath to deliver seisin.

Diversity
herein in the
case of a cor-
poration ag-
gregate;
18 H. 8. 3.
11 H. 7. 19.
(1 Sid. 162.)

Fifthly, all this is to be understood of sole persons, or of a corporation or body consisting of one sole person, or a bishop, parson, &c. But it holdeth not in a corporation aggregate of many persons capable (32). And therefore if a mayor and commonalty make a charter of feoffment, and a letter of attorney to deliver seisin, the livery of seisin is good after the decease of the mayor, because the corporation never dieth (33). The like of a dean and chapter, *et sic de similibus*.

or as to a li-
cense to
alien.

(346)*
(4 Co. 119 b.
Cro. Jac. 103.
6 Co. 38.)
Mich. 3 Ja. in
Com. Banc.
F. N. B. 253.
2 E. 3. Off. de
Court. 29.
Stann. Frar.
30. (1 Rol.
Abr. 331, 332.)
Letter of at-
torney may be
contained
in a deed
poll;
or in an in-
denture, the
attorney be-
ing made a
party.
(*) Commu-
nis error fecit
jus (ut dict-
tur) in con-
trarium.
(2 Inst. 672.
2 Rol. Abr. 8.
Cro. Eliz.
906.)

Lastly, if the lessor by his deed license the lessee for life *or years (which is restrained by condition not to alien without license) to alien, and the lessor dieth before the lessee doth alien, yet is his death no countermand of the license, but that he may alien, for the license exempteth the lessee out of the penalty of the condition, and it was executed on the part of the lessor as much as might be. And so was it resolved, Mich. 3 Jacob. in Communi Banco. As if the king doth license to alien in mortmain, and dieth, the license may be executed after (34) (q).

And it is to be known, that a deed of feoffment beginning *Omnibus Christi fidelibus, &c.* or *Sciant presentes et futuri, &c.* or the like, a letter of attorney may be contained in such a deed; for one continent may contain divers deeds to several persons; but if it be by indenture between the feoffor on the one part, and the feoffee on the other part (*), there a letter of attorney in such a deed is not good, unless the attorney be made a party in the deed indented (35).

(30) "If A. and B. joint tenants in fee make charter of feoffment to C. and D. with letter of attorney to deliver seisin, and B. or C. dies, it is good as to the survivor. M. 32, 33 Eliz. W. 68."—[Hargr. n. 6. 52 b. (340.)]

(31) "Vid. letter of attorney to deliver seisin after the feoffor's death in 40 Ass. 38. Nota, by devise or by special custom authority may be created executory after the party's death. Lease to A. for life, remainder to B. for life. A. dies, *videtur*, that livery cannot be made to B. P. 31 Eliz. B. R. W.

n. 4. *Pierce and Leverage*." Hal. MSS.—[Hargr. n. 7. 52 b. (341).]

(32) "11 H. 7. 27. 12 H. 8. 12. 5 H. 7. 25. 21 H. 7. 1." Hal. MSS.—[Hargr. n. 8. 52 b.]

(33) "But it seems, that livery cannot be made till the new mayor is made." Hal. MSS.—[Hargr. n. 9. 52 b. (342).]

(34) "Vid. Plowd. Com. 457. *contra* in license to the tenant to alien, *ut videtur*." Hal. MSS.—[Hargr. n. 10. 52 b.]

(35) "Adjudged *contra* between *Dicher* and *Noland*." Hal. MSS.—See also another

(q) That, under a covenant not to alien without leave, if leave is once granted, the covenant is entirely discharged; whether the license to assign be general (*Dumper's case*, 4 Co. 119), or particular, as to one particular person subject to the performance of the covenants in the original lease, see *Brummel v. Macpherson*, 14 Ves. 173. Ante, p. 29, 30. n. (r).—[Ed.]

A livery in law is, when the feoffor saith to the feoffee, being in the view of the house or land, (I give you yonder land to you and your heirs, and go enter into the same, and take possession thereof accordingly (x)), and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment,* for *signatio pro traditione habetur* (36). And herewith agreeth Bracton : *Item dici poterit et assignari, quando res vendita vel donata sit in conspectu, quam venditor et donator dicit se tradere* : and in another place he saith, *in seisin per effectum et per aspectum*. But if either feoffor or the feoffee die before entry the livery is void (37). And livery within the view is good where there is no deed of feoffment. (n) And such a livery is good, albeit the land lie in another county.

(o) A man maketh a charter of feoffment and delivers seisin within the view, the feoffee dares not enter for fear of death, but claims the same, this shall vest the freehold and inheritance in him, albeit by the livery no estate passed to him, neither in deed nor in law, so as such a claim shall serve, as well to vest a new estate and right in the feoffees, as in the common case to revest an ancient estate and right in the disseisee, &c. as shall be said hereafter more at large in the Chapter of Continual Claim. And so note a livery in law shall be perfected and executed by an entry in law.

If a man letteth lands or tenements by deed or without deed (s) (38), (for seeing that the remainders take effect by livery, there needs no deed) (39), *for term of years, the remainder over to an-*

case *contra* in Cro. Eliz. 905. The case cited by Lord Hale is in 2 Rol. Abr. 8. pl. 12.—[Hargr. n. 4. 52 b.]

[See also Sheph. Touch. 217. where it is said that the authority may be either in the deed of feoffment itself, whether it be poll or indented, and although the attorney be not a party to it, or else by a separate deed. Et vid. 2 Rol. Abr. 8, 9. 2 Prest. Conv. 418. The appointment is most usually made by the deed of feoffment, but the distinction mentioned by Lord Coke is not attended to in practice.]—[Ed.]

(36) *Nota the case of 38 Ass. 2. A. makes feoffment to B. within the view, and afterwards marries her, and afterwards claims to the use of the wife; it is a good execution of the livery. 38 E. 3. 11. Vid. 42 E. 3. Feoffments 54. Livery good, though the land is not within view." Hal. MSS.—[Hargr. n. 4. 48 b. (315.)]

(x) Livery within view, or livery in law, seems to have been made at first only at the court barons, which were anciently held *sub dio* in some open part of the manor, from whence a general view might be taken of the whole manor; and the *pares curie* could easily distinguish that part of the land which was to be transferred. But this sort of livery is not perfect to pass the freehold, till an actual entry is made by the feoffee; because the possession is not delivered to him, but only a license or power is given to him by the feoffor to take possession. Infra, 48 b. Pollexf. 47. Vent. 186.—[Ed.]

(s) See n. (x) supra, p. 337.—[Ed.]

48 b.
Livery in law defined.
38 E. 3. 11.
38 Ass. p. 2.
43 Ass. p. 20.
Temps H. 8. tit. Feoffments. Br. 70. 18 E. 3. 16 b. 28 H. 3. F. 18. 9 E. 4. 39. per Moyls, Bract. lib. 2. cap. 18. & lib. 4. fol. 225 a. (1 Co. 156. Post, 253 a.) (347)*
Is revocable by the death of the feoffor or feoffee before entry. Livery within the view is good, though the land lie in another county. (n) 9 E. 4. 39. 38 E. 8. 11. Where the feoffee dares not enter, a claim is sufficient. (o) 38 Ass. p. 23.
LITTLETON. [Sect. 60. 49 a.]

[So, where there were two joint tenants in fee, and one of them made livery within the view, viz. go enter and take possession; but before it was executed she married the feoffee himself; it was argued that this feoffment was void, because there was no actual entry pursuant to the livery, and that by the subsequent marriage the feoffee was seised in right of his wife, and could not by his entry work any prejudice to her right; but it was adjudged that he might enter at any time, for he had not only an authority so to do, but an interest passed by the livery in view, by which act the woman did all which was in her power to do. *Parsons v. Petit*, 3 Salk. 165.]—[Ed.]

(37) "1 Rep. *Rector of Cheddington's case*." Hal. MSS.—[Hargr. n. 5. 48 b.]

(38) *Un par*, L. and M.

(39) "12 H. 4. 20." Hal. MSS. [Hargr. n. 8. 49 a.]

Livery of seisin necessary to pass a freehold interest in remainder.

[COKE, 49 a.]

22 H. 6. 1. 10
E. 4. 1. 13 E.
4. 13.

(348)*

On lease for years, remainder for life, in tail, or in fee, livery must be made to the lessee.

49 a.

*49 b.

(Ante, 143 a.)

*other for life, or in tail, or in fee; in this case it behoveth, that the lessor maketh livery of seisin to the lessee for years, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termor in this case entereth before any livery of *seisin made to him, then is the freehold, and also the reversion, in the lessor. But if he maketh livery of seisin to the lessee, then is the freehold together with the fee to them in the remainder, according to the form of the grant and the will of the lessor (τ).*

“*Maketh livery of seisin to the lessee.*” This livery is not necessary in this case for the lessee himself, because he hath but a term for years, but it is for the benefit of them in the remainder, so as the livery to the lessee shall enure for the benefit of them in the remainder: for the *livery of the possession could not be made to the next in remainder, because the possession belonged to the lessee for years; and for that the particular term and all the remainders made in law but one estate, and take effect at one time, therefore the livery is to be made to the lessee.

Livery to one of two lessees, in the name of both, is sufficient, (5 Co. 94 b.) seisin as to livery to one of two joint attorneys.

(349)*

Livery to one of two feoffees, is void as to the absentee, unless by deed.

10 E. 4. 1.
12 E. 4. 16.
15 E. 4. 18.
22 E. 4. 35.
40 E. 3. 10. 41.
(42) Temps

But if a lease for years without deed (v) be made to A. and B., the remainder to C. in fee, and livery is made to A. in the absence of B. in the name of both; it seemeth the livery is good to vest the remainder: and there is a diversity between two joint attorneys to receive livery for another, and livery and seisin is made to one of them in the name of both, this is clearly void, because they had but a mere and bare authority (40), and they both do in law make but one attorney, unless the warrant be jointly and severally (41), but the lessee for years hath an interest in the land (w).

*Again, if A. is to make a feoffment to B. and C., and their heirs, without deed, and A. makes livery to B. in the absence of C. in the name of both, and to their heirs; this livery is void to C., because a man being absent cannot take a freehold by a livery, but by his

(40) See further as to the difference between a naked authority and an authority coupled with an interest, ant. 52 b. 343. 113 a. vol. 1. p. 398, 399. and 181 b. vol. 1. p. 738.—[Hargr. n. 1. 49 b.]

(41) See ant. 52 b. p. 343. n. (26).

(42) “18 E. 4. 12,” Hal. MSS.—[Hargr. n. 3. 49 b.]

(τ) But, though, as appears from this case, an estate may be created by feoffment to commence *in futuro*, by way of remainder, it has long been an established principle, that a feoffment cannot be made to commence *in futuro*; and therefore if a person makes a feoffment to commence on a future day, and delivers seisin immediately, the livery will be void, and nothing more than an estate at will passes to the feoffee. Ante, 217 a. p. 12—14. This doctrine is founded on two reasons, 1st. Because the object and design of the ceremony of livery of seisin would fail, if it were allowed to pass an estate to commence *in futuro*: as it would in that case be no evidence of the change of possession. 2d. The freehold would be in abeyance, which is never allowed where it can, by any means, be avoided. 5 Co. 946. Cro. Eliz. 454. 2 Vent. 204. 2 Wils. 166.—[Ed.]

(v) See supra, p. 337. n. (ε).—[Ed.]

(w) And the law intends that there is such a mutual trust between those that take a joint estate, that the act of either of them is effectual for himself and the other, especially where it is not prejudicial to him. Hawk. Abr. 84.—[Ed.]

attorney being lawfully authorized to receive livery by deed (x), unless the feoffment be made by deed, and then the livery to one in the name of both is good (43).

H. 8. Feoffments 72. 6 H. 4. 2 b. Litt. 153. 3 H. 7. 13. (Post, 369 a.) (Ante, 36a. 9 Co. 137.) Livery within view to lessee for years, is void to pass a remainder.

A man makes a lease for years to A., the remainder to B. in fee, and makes livery to A. within the view; this livery is void, for no man can take by force of a livery within the view, but he that taketh the freehold himself.

"And if the termor in this case entereth before any livery made, &c." By the entry of the lessee he is in actual possession, and then the livery cannot be made to him that is in possession, for *quod semel meum est, amplius meum esse non potest*. But if the lessor and lessee come upon the ground, of purpose for the lessor to make, and for the lessee to take livery, there his entry vests no actual possession in him until livery be made; for (p) *affectio tua nomen imponit operi tuo* (44). And therefore if it be agreed between the disseisor and disseisee, that the disseisee shall release all his right to the disseisor upon the land, and accordingly the disseisee entereth into the land, and delivereth the release to the disseisor upon the land, this is a good release; and the entry of the disseisee, being for this purpose, did not avoid the disseisin, for his intent in this case did guide his entry to a special purpose. And so was it resolved (q) by Sir James Dyer, and the whole court of common pleas, Pasch. 18 Eliz. upon evidence which I myself heard and observed. But if disseisor enfeoff the disseisee and others, there albeit the disseisee* came to take livery, yet when livery is made, the disseisee is remitted to the whole in judgment of law, as shall be said more at large in the Chapter of Remitter in his proper place.

Livery must be made before the lessee enters; (36o. 14.) unless he enters for the purpose of receiving livery. (p) Bracton, lib. 1.

(q) P. 19 Eliz. in Communi Banc. Pl. Com. in Ass. de fresh-force 91. 29 Ass. 26. 43 Ass. p. 3. 3 H. 6. 19. in form-don. (46) (350)*

A man makes a lease for years, and after makes a deed of feoffment and delivers seisin, the lessee being in possession and not assenting to the feoffment, this livery is void; for albeit the feoffor hath the freehold and inheritance in him, yet that is not sufficient (r), for a livery must be given of the possession also (46); but if

48 b. Livery of seisin, the lessee for years being in possession and not assenting is void;

(43) "Dy. 14. 35. 18 H. 6. 9. 22 H. 6. 1." Hal. MSS.—[Hargr. n. 4. 49 b.]

(44) "Nota, if the lease for years with the remainder over be by deed, the deed ought not to be delivered till livery made; for otherwise the livery is bad. H. 2 Eliz. *Helyar's case*. Vide Bendl. n. 130." Hal. MSS.—See N. Ben. 85. and S. C. Mo. 14. 1. And. 8.—[Hargr. n. 5. 49 b. (322).]

(45) "9 H. 7. 1. 41 E. 3. 17." Hal. MSS.—[Hargr. n. 6. 49 b.]

(46) "P. 40 Eliz. B. R. A. tenant for years; the reversion is granted to B. for life,

remainder to C. in tail, remainder to D. in fee; D. by deed infeoffs A. and one E. and makes livery; it was ruled to be void, because there was not any surrender, and A. was in possession and could not take by livery. *Edes and Knotsford*. A tenant for years, remainder to the king for years, remainder to B. in fee; B. enters and ousts A. and makes livery; it is good, notwithstanding the mesne remainder for years to the king; but it would have been otherwise, if the king's remainder had been for life." Hal. MSS.—[Hargr. n. 7. 48 b. (317).]

(x) Except where a man takes a freehold by way of remainder, by livery made to another, in his absence, as in the above case of a lease for years with remainder in fee. Supra, 49 a.—[Ed.]

(r) As livery of seisin is the delivery of the actual possession; no person can give livery of seisin who has not at the moment the actual possession. And therefore where a

(2 Bol. Abr. 4.) the lessee be absent, and hath neither wife nor servants (though he hath cattle) upon the ground, the livery of seisin shall be good.

Dy. 33 a.
Mo. 11.
secus if there
be no person
on the pre-
mises.
2 Co. 31, 32.
Bettisworth's
case.

If a man be seised of an house, and of divers several closes in one county in fee, and makes a lease thereof for years, and afterwards maketh a feoffment in fee of the same, and makes livery of seisin in the closes (the lessee or his wife or servants then being in the house) the livery is void for the whole: for the lessee cannot be upon every parcel of the land to him demised, for the preservation or continuance of his possession therein. And therefore his being in the house, or upon any part of the land to him demised, is sufficient to preserve and continue his possession in the whole from being ousted or dispossessed (47).

(351)*
Feoffment
and letter of
attorney to
take posses-
sion and after
make livery,
the feoffor be-
ing out of pos-
session, is
good:
(r Hill. 37
Eliz. Rot. 620,
in Com. Ban-
co. inter
Browne &
Terry adjud.
Dyer 16. El.
234. 3 Eliz.
Dyer 131.
(6 Co. 26.)
secus as to a
lease for
years, the
lessor being
out of posses-
sion at the
time of the
first delivery;
3 Co. 35. inter
Jennings &
Bragge.
(2 Co. 31 b.)
(3 Co. 35 b.)

*(r) If a man be disseised, and make a deed of feoffment and a letter of attorney to enter and take possession, and after to make livery *secundum formam cartæ*, this is a good feoffment, albeit he was out of possession at the time of the charter made (48), for the authority given by the letter of attorney is executory, and nothing passed by the delivery of the deed till livery of seisin was made. And in ancient letters of attorney power is given to others to take possession for the feoffor.

But if a man be disseised, and make a writing of a lease for years, and deliver the deed, and after deliver it upon the ground, the second delivery is void, for the first delivery made it a deed, and for that the lease for years must take effect by the delivery of the deed, therefore the deed delivered when he was out of possession was void. But so it is not of a charter of feoffment, for that takes effect by the livery and seisin. But if the lessor had delivered it as

(47) "But *nota*, if lessee consents, livery is good, though he be upon the land. T. 40 Eliz. *Shephard and Gray*. A. makes lease for years, and afterwards makes charter of feoffment with letter of attorney to enter and take possession and seisin for him, and such seisin and possession to deliver; the attorney makes livery with the consent of the lessee, he being in the land; and it was ruled good. P. 1651. *Wegg and Villers*. Lessee for years, consents, that feoffor shall make livery, and afterwards goes out of the country, leaving servants on the land; the feoffor enters and makes livery; it was ruled good. But it was ruled, that if lessee be absent, livery by lessor by consent of servants is void, they being upon the land. T. 7 Jac. C. B. n. 45. D. D. *Blackleach and Small*. But if A. be lessee of *White Acre* by one demise and of *Black Acre* by another demise

of the same lessor; or if there be lessee of *White Acre* and *Black Acre* by one demise, and he makes lease for years of *Black Acre*, and lessor enters on *Black Acre* and makes livery, though A. be on *White Acre*, it is good, 2 Rep. *Bettisworth's case*." Hal. MSS. —[Hargr. n. 8. 48 b. (318).]

(48) "H. 22 Car. B. R. *Hinde's case*. M. 4 Jac. B. R. *Spark and Darcy*. 37 Eliz. *Brown's case*. Charter of feoffment of lands in the hands of the king with letter of attorney to make livery, and afterwards the feoffor sues *ouster maine*, and the attorney makes livery; it is good. 25 Eliz. Feoffment on condition which is broken; feoffor makes charter of feoffment and letter of attorney to deliver seisin, the attorney enters and makes livery; it is good. *Dick's case*." Hal. MSS. —[Hargr. n. 6. 48 b. (316).]

person makes a feoffment of lands which are let on lease, he must obtain the assent of the lessee to the livery. And in cases of this kind the practice formerly was, for the lessee to give up the possession for a moment to the lessor, to enable him to give livery. *Bettisworth's case*, 2 Co. 31 b. 4 Cru. Dig. 103.—[*Ed.*]

an escrow, to be delivered as his deed upon the ground, this had been good.

unless it was delivered as an escrow.

Note a great diversity, when a man hath two ways to pass lands, and both of the ways be by the common law, and he intendeth to pass them by one of the ways, yet *ut res magis valeat* it shall pass by the other. But where a man may pass lands either by the common law, or by raising of an use, and settling it by the statute, there in many cases it is otherwise (49). For example, if a man be seised of two acres in *fee, and letteth one of them for years, and intending to pass them both by feoffment, maketh a charter of feoffment, and maketh livery in the acre in possession, in name of both, only the acre in possession passeth by the livery; yet if the lessee attorn, the reversion of that acre shall pass by the deed and attornment, for he is in by the common law, and in the *per* in both, and so in the like. But otherwise it is, if the father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made, yet no use shall rise to the son, because he should be in by the statute in another degree, viz. in the *post*, and the intention of the parties work much both in the raising and direction of uses (z).

49 a.

Diversity between the cases where a man has two ways to pass lands by the common law; and where he has two ways, the one at common law and the other by the statute of uses.
7 E. 4. 20 a. per touts les Just. 11 H. 4. 72. Pl. Com. 152. 10 E. 4. 3. (Mo. 99.) (352)*
2 Co. 35. 36. Sir R. Heyward's case. (1 Sid. 25. 26. 32. 2 Co. 94. 3 Leo. 371.)

(49) "Where land shall pass by one way or the other at common law. Termor for years makes charter of feoffment by the word *dedi*, with letter of attorney in the same deed to deliver seisin, and afterwards livery is made, yet it is a forfeiture, and the term shall not be said to pass first by the delivery of the deed, as it seems. Dy. 362.—Grant to a tenant at will shall enure as a confirmation. Dy. 269.—29 Eliz. B. R. *Leonard's case*. If A. makes lease for years to B. and afterwards makes a charter of feoffment to B. being in possession with the words *dedi et concessi*, with letter of attorney to deliver seisin; before livery, he may use the deed as a confirmation in fee, and after livery as a feoffment. And there it was also agreed, that if by indenture in consideration of money, A. bargains and sells to B. with letter of attorney, and the deed is inrolled, it is a good bargain and sale.—17 Eliz. Lessee for life and he in remainder in fee make charter of feoffment, and letter of attorney to make livery, which is made accordingly, it is good, and the remainder shall not be said to pass by delivery of the deed. *Where one shall have election to take by statute or common law*. Vid. Dy. 303. Grant of reversion to a brother averred to be *pro fraterno amore*.—2 Rep. Sir R. Heyward's case. *Demisi* or *concessi* taken either as lease or bargain and sale. 7 Rep. *Bedell's case*. Grant to a son.

T. 15 Car. B. R. entered H. 11 Car. Rot. 459. Father gives and grants to his son and his heirs, *habendum* after the death of the father; and no consideration of blood or marriage is mentioned in the deed: an estate shall not arise by way of use. *Nota videtur*, that there was a letter of attorney in the deed. P. 1657. *Jackson's case*. A. by indenture for love and affection grants to B. a rent *in case*, *habendum* to B. for life, remainder to the use of C. in tail, remainder to the use of A.'s right heirs, and attornment was made, but not till after the death of A.; and it being found that B. was cousin, it was ruled, that an estate should arise by way of use without attornment.—*Where one may elect one way or the other by statute*. Vid. 7 Rep. *Bedell's case*. If father in consideration of money bargains and sells to his son, there ought to be an inrollment. But if A. for natural love to his son, and also for money grants to the son, the land shall pass without inrollment, because the consideration of love is expressed. M. 1649. *Wats and Dicks*, B. R." Hal. MSS.—See further as to electing in what way an estate shall pass, Yelv. 124. the case of *Crossing and Scudamore*, 1 Vent. 137. and 1 Mod. 175. and *Barker and Keat*, in 2 Mod. 249. See also Vin. Abr. *Uses*, B. a. and the observation in Hawk. Abr. of Co. Litt. 83.—[Hargr. n. 1. 49 a. (319).]

(z) In the former case, the acre, which, not being in the feoffor's possession could not pass by the feoffment, yet passed by way of grant of a reversion and attornment, because that mode of conveyance is by common law as well as the other. But where a person intends to pass land by conveyance at common law, and it cannot pass that way, the law

(353)*
1 R. 3. ca. 1.
21 H. 7.

So *if *cesty que use* and his feoffees had joined in a feoffment after the statute of 1 R. 3., &c. it had been the feoffment of the feoffees, and the confirmation of *cesty que use*, for the statute at the common law shall be preferred.

2. What things may pass by feoffment and livery.

So to conclude this point; of freehold and inheritances, some be corporeal, as houses, &c. lands, &c. these are to pass by livery of seisin, by deed or without deed; some be incorporeal, as advowsons, rents, commons, estovers, &c. these cannot pass without deed, but without any livery (50). And the law hath provided the deed in place or stead of a livery. And so it is if a man make a lease, and by deed grant the reversion in fee, here the freehold with attornment of the lessee (A 1) by the deed doth pass, which is in lieu of the livery. See Bracton, lib. 2. cap 18. *Et est traditio de re corporali de personâ in personam de manu, &c. gratuita translatio et nihil aliud est traditio in uno sensu, nisi in possessionem inductio, de re corporali; et ideo dicitur, quoddam res incorporales non patiuntur traditionem sicut ipsum jus quod rei sive corpori inhæret, et quia non possunt res incorporales possideri sed quasi, ideo traditionem non patiuntur.*

48 b.
(s) 9 E. 4. 28.
40. 5 H. 7. 9.
3 H. 6.
tit. Pleint l.
11 H. 4. 32.
11 E. 3. Ass. 86.

(s) A man may have an inheritance in an upper chamber, though the lower buildings and soil be in another, and, seeing it is an inheritance corporeal, it shall pass by livery.

49 a.
3. Advantages of this mode of conveyance.

(354)*
2 Co. 56.
Buckler's case.

This ancient manner of conveyance by feoffment and livery of seisin, doth for many respects exceed all other conveyances. For, as hath been said (51), if the feoffor be out of possession, neither fine, recovery, indenture of bargain and sale inrolled, nor other conveyance, doth avoid an estate by *wrong, and reduce clearly the estate of the feoffee, and make a perfect tenant of the freehold, but only livery of seisin upon the land (B 1): the other conveyances

(50) See ante, 9 a. p. 332, 333. post, 47 a. ante, 48 a. p. 334. 121 b. vol. 1. p. 207. and 169 a. vol. 1. p. 706.—[Hargr. n. 2. 49 a.]

(51) Ant. 9 a. p. 332, 333.

will not raise an estate by way of use by force of the statute: thus, in the case now under consideration, the law will not raise an use to the son, by construing the charter as a covenant to stand seised to the use of the son in consideration of natural affection; for the father expressly designed that it should enure by way of feoffment, by force of which conveyance, the law would adjudge the son to be in the land by the father, which is called in the *per*, whereas by the other he is rather esteemed to come after him, than by him, which is called in the *post*; and also, if it should enure by way of covenant to stand seised, it would pass the whole estate immediately, and consequently the livery of seisin could take no effect. But later authorities are contrary to Lord Coke, as to this point, because the principal intent of the deed is to pass an estate to the son, and it shall not be frustrated by adhering too strictly to the form of the conveyance, if by any construction it can be made effectual. 3 Lev. 9, 10. 213. 371. Yet it has been resolved that a covenant to levy a fine, which shall be to such and such uses, does not amount to a covenant to stand seised, because then the party could not levy the fine, 3 Lev. 126, 306; but in this case the words of the deed do not purport the grant of an estate passing immediately, as they do in the case in the text. Hawk. Abr. 83.—[Ed.]

(A 1) The necessity of attornment, to give effect to a grant of a reversion, &c. is taken away by stat. 4 & 5 Ann. c. 16. See the next Chapter.—[Ed.]

(B 1) And it not only passes the present estate of the feoffor, but bars him of all present

being made off from the ground do sometimes more hurt than good, when the feoffor is out of possession (52). And yet in some cases a freehold shall pass by the common law without livery of seisin; as if a house or land belongs to an office, by the grant of the office by deed, the house or land passeth as belonging thereunto. So, if a house or chamber belong to a corody, by the grant of a corody, the house or chamber passeth. A freehold may by custom be surrendered without livery, as *hereafter shall be said (54): and so of assignment of dower *ad ostium ecclesie*, or otherwise, and by ex-

1 H. 7. 28.
8 H. 7. 4.
31 H. 6. 16.
8 H. 7. 4.
M. 31 E. 1.
Coram Rege.
Ranulph
Huntingwell's
case. (63)
3 E. 3. Coron.
310. 11 H. 4.
83. Vid. sect.
74.
(355)*

(52) "For this see 2 Rep. 56. *Buckler's case*. Fine by disseisee extinguishes his right, and shall enure to the disseisor. But see this denied M. 13 Car. B. R. Crook, n. 7. *Fitzherbert's case*." Hal. MSS.—See Cro. Cha. 483. and S. C. W. Jo. 397. In this last book it is said, that the judges did not deliver any opinion on the point. See further W. Jo. 317. Cro. Cha. 305. and Gouldsb. 162.—[Hargr. n. 4. 49 a. (320).]

[That the right of entry of a disseisee is extinguished by his fine to a stranger, whereof the disseisor shall take advantage, see acc. 1 Prest. Conv. 209.]—[Ed.]

(53) "Rot. 74." Hal. MSS.—[Hargr. n. 5. 49 a.]

(54) "Vid. 5 Rep. *Peryman's case*." Hal.

MSS.—5 Co. 84. In *Peryman's case* the jury found, that in the manor of Portchester there was a custom, according to which all alienations of lands within that manor by writing, feoffment, or last will were void, unless presented to be a good custom. In the same case mention is made, that by the custom of Lidford Castle, in Devonshire, a freeholder of inheritance cannot pass his freehold except by surrender into the lord's hands. As to this latter kind of custom, in consequence of which the estates subject to it have been called *customary freeholds*, see post, 59 b. and Blackst. Law Tracts, 8vo. edit. vol. 1. p. 144.—[Hargr. n. 6. 49 a. (321).]

[Et vid. ante, vol. 1. p. 658. n. (e).]—[Ed.]

and future right to the estate which is so conveyed; so that if a man has several estates, all of them pass by his feoffment: and if he has any interest, rent, common, or the like, in, or out of the land, it is extinguished and gone by the feoffment. Perk. Sect. 210. 1 Co. 121. 6 Co. 70. Plowd. 423, 424. It bars the feoffor of all collateral benefits touching the land, as conditions, powers of revocation, writs of error, and the like: therefore, if a man creates an estate of his land upon condition, and afterwards makes a feoffment of the land; by this he is barred for ever of taking advantage of the condition. It also destroys contingent uses, and gives away inclusively a future use, seignory, or right of action; for both the feoffment and livery of seisin are much favoured in law, and are construed most strongly against the feoffor, and in advantage of the feoffee. Shep. Touch. 204. But the most singular and powerful effect of the feoffment is, that it operates on the possession, without any regard to the estate or interest of the feoffor; so that to make a feoffment good and valid, nothing is wanting but possession, 1 Burr. 60. 2 Prest. Conv. 237; and where the feoffor had possession, though it be ever so bare and naked, yet a freehold or fee-simple passes by it, by reason of the livery. 1 Burr. 92. Post, 330 b. 366 b. 377 a. The principle upon which this doctrine is founded will be considered in a subsequent chapter. See post, Chap. 47. of Disseisin, and the notes there; and see the case of *Taylor v. Horde*, 1 Burr. 60. As a feoffment operates by transmutation of possession, it will vest the inheritance in the feoffee and his heirs, if so limited, although no consideration be paid, see Anders. 37, pl. 95; but without a consideration it would be void against creditors. 1 Bart. Prec. Convey. 40. n. (4). A feoffment by a tenant in tail in possession, creates a discontinuance of the estate-tail, by transferring to the feoffee not only the possession, but also the right of possession, so as to take away the right of entry of the issue in tail, and of the remainder-man or reversioner, and drive them to a real action. Post, 327 b. And if made by a particular tenant, it creates a forfeiture of his estate. Ant. 251 a. p. 206. Lastly, a feoffment may be used not only for conveying an estate of freehold in corporeal property, but also for the various purposes of barring entails, destroying contingent remainders, powers, conditions, &c. 4 Bart. Elem. par. 1. c. 3. But this mode of conveyance, which was attended with many inconveniences countervailing its advantages, is now but little in practice; it having been almost entirely superseded by the conveyance by lease and release. See 2 Prest. Conv. 218. With respect to what persons may convey by feoffment, see ante, 42 b. p. 219. 200 b. vol. 1. p. 788, 789.—[Ed.]

change a freehold may pass without livery, as hereafter shall be said.

6 a.
On feoffment
in fee without
warranty, the
purchaser is
entitled to all
the deeds:
(7) 1 Co. fol. 1
& 2. in Selg.
Buckhurst's
case. 44 E. 3.
11 b. 39 E. 3.
17 a. 19 H. 6.
65 b. 34 H. 6.
1 a. 10 E. 4.
9 b. 18 E. 4.
14, 15. 6 H. 7.
3 b. H. 7. 33 a.
(2 Rol. Abr.
31.)
secus as to
deeds relat-
ing to the ti-
tle, if the feof-
for be bound
to warranty.

(t) A man seised of land in fee has divers charters, deeds, and evidences, and maketh a feoffment in fee, either without warranty, or with warranty only against him and his heirs, the purchaser shall have all the charters, deeds, and evidences, as incident to the lands *et ratione terræ*, to the end he may the better defend the land himself, having no warranty to recover in value; for the evidences are, as it were, the sinews of the land, and the feoffor not being bound to warranty hath no use of them. But if the feoffor be bound to warranty, so that he is bound to render in value, then is the defence of the title at his peril; and therefore the feoffee in that case shall have no deeds that comprehend warranty, whereof the feoffor may take advantage (c 1). Also, he shall have such charter, as may serve him to deraign the warranty paramount. Also, he shall have all deeds and evidences, which are material for the maintenance of the title of the land; but other evidences which concern the possession, and not the title of the land, the feoffee shall have them (55).

(356)*

CHAP. XXXVII.*

SAME SUBJECT.

9 b.

Definition of
a grant.
3 Co. 63. in
Lincoln Col-
lege case.
(1 Rol. Abr.
833. 6 Co. 16
b.)

OF GRANT AND ATTORNMENT.

GRANT, *concessio*, is properly of things incorporeal, which (as hath been said) cannot pass without deed.

172 a.
Lib. 3. fol. 63.
in Lincoln

Grant, *concessio*, is in the common law a conveyance of a thing that lies in grant and not in livery, which cannot pass without deed;

(55) See Cro. Eliz. 347. Cro. Cha. 442. Noy. 145. In all of these books it is said, that in the case of conveyances to uses the possession of deeds appertains to the *feoffee* or *covenantee*, and not to *cestui que use*; and the reason given is, that it was so at common law; and the statute of uses, though it transfers the legal estate to *cestui que use*,

doth not transfer the deeds. But this doctrine seems questionable.—[Hargrave, n. 4. 6 a. (25).]

[See *Hooper v. Ramsbottom*, 6 Taunt. 14. in which case the court observed, that the person who is entitled to land has a right to the title deeds of that land.]—[Ed.]

(c 1) Acc. *Hooper v. Ramsbottom*, 6 Taunt. 14. And therefore where a vendor warrants his title, which in deeds of feoffment he usually does, it is proper to insert an express grant of the title deeds. 1 Bart. Prec. Conv. 43. n. 11. Idem, 45. n. 16. For the learning respecting deeds and the right to them, see *Buckhurst's case*, 1 Co. 1. *Field v. Yea*, 2 T. R. 708. 2 Prest. Conv. 466. and the above case of *Hooper v. Ramsbottom*, in which it was determined, that if the vendor of a leasehold estate delivers the conveyance as an escrow, to take effect on payment of the residue of the purchase-money, the property in the title deeds of the estate is so vested in the vendee, that the vendor obtaining possession of them, and pawning them, confers on the pawnee no right to detain them after tender of the residue of the purchase-money.—[Ed.]

as advowsons, services, rents, commons, reversions, and such like. Of this sufficient hath been said in the First Chapter of the First Book (A). College case.

It is to be observed, to what kind of inheritances being granted, an attornment is requisite. And in this chapter Littleton speaketh of five. First of a seignory, rent service, &c. Secondly, of a rent charge. Thirdly, of a rent seck. And *hereafter in this chapter of two more, viz. of a reversion and remainder of lands; for the tenant shall never need to attorn, but where there is tenure, attendance, remainder, or payment of a rent out of land. 390 a.
Attornment necessary to the grant of what inheritances.
21 H. 7. 1.
(1 Rol. Abr. 292, 293.)
(37)*

And therefore if an annuity, common of pasture, common of estovers, or the like, be granted for life or years, &c. the reversion may be granted without any attornment; and albeit sometimes in some of these cases, or the like, an attornment be pleaded, yet it is surplusage, and more than needeth, because in none of them there is any tenure, attendance, remainder, or payment out of land. 1 H. 5. 1.
37 Ass. 14.
36 Ass. pl. 3.
31 H. 8. 11.
Attornment Br. 59. (Post, 303 b.)

Attornment, is an agreement of the tenant to the grant of the seignory, or of a rent, or of the donee in tail, or tenant for life or years, to a grant of a reversion or remainder made to another. It is an ancient word of art, and in the common law signifieth a turning or attorning from one to another. We use also *attornamentum* as a Latin word, and *attornare* to attorn. And so Bracton useth it (a): *Item videndum est, si dominus attornare possit alicui hominagium et servitium tenentis sui contra voluntatem ipsius tenentis, et videtur quodd non.* 309 a.
Definition of attornment.
Bract. lib. 2. fol. 81.
Britton, fol. 105 b. 176 & 177.
Fleta, lib. 3. cap. 6. (1 Rol. Abr. 293.)
(1 Rep. 69.)
(a) Bracton. lib. 2. fol. 81 b. Fleta, Britton, ubi supra.

And the reason why an attornment is requisite, is yielded in old books to be: *Si dominus attornare possit servitium tenentis contra voluntatem tenentis, tale sequeretur inconveniens, quod possit eum subjugare capitali inimico suo, et per quod teneretur* Bracton, lib. 2. fol. 81 b. Britton, ubi supra.

(A) A grant is a conveyance appropriated to the transfer of things not in possession, as reversions and remainders, and other incorporeal hereditaments, as rents, advowsons, &c. of which no livery can be had. Hence the expression that advowsons, rents, commons, &c. lie in grant. It was a rule that a grant could not be made without deed; because as the possession of those things, which are the subject matter of a grant, cannot be transferred by livery, there could be no other evidence of a grant but the deed. But it was always held that a grant, with the attornment of the tenant, was equally valid with a feoffment and livery. Ante, 9 a. p. 333, 334. 2 Bl. Com. 317. Watk. Conv. 97. 4 Cru. Dig. 111. 2 Prest. Conv. 209, 210. A gift, *donatio*, is properly applied to the creation of an estate tail, as a feoffment is, to that of an estate in fee-simple. And, considered in this view, it differs in nothing from a feoffment, but in the nature of the estate passing by it; for the operative words of this conveyance are *do* or *dedi*, and livery of seisin must be given to render it effectual. 2 Bl. Com. 306. A feoffment, however, is always applied to an immoveable thing; but a grant is often used for the conveyance of moveable things also; as trees, cattle, household stuff, &c. the property whereof may be altered, as well by gift, as by sale or grant. Shep. Touch. 227.

A grant is, at this day, a suspicious species of conveyance, as being without what the law denominates either a good or valuable consideration. It is void as to those who were creditors of the donor at the time of its being made, though valid as to subsequent creditors. Watk. Conv. 100. 13 Vin. 519. tit. Fraud. 22 Vin. 15. tit. Voluntary Convey. Ante, 3 b. p. 236, 237. and the notes there.—[Ed.]

sacramentum fidelitatis facere ei qui eum damnificare entenderet (1) (B).

(1) Sir Martin Wright and many other writers have laid it down as a general rule, that by the old feudal law the feudatory could not alien the feud without the consent of the lord; nor the lord alien or transfer his seignory without the consent of his feudatory: for the obligations of the lord and his feudatory being reciprocal, the feudatory was as much interested in the conduct and ability of the lord, as the lord in the conduct and ability of his feudatory; and that as the lord could not alien, so neither could he exchange, mortgage, or otherwise dispose of his seignory, without the consent of his vassal. See Sir Martin Wright's Introduction to the Law of Tenures, 30, 31.—It is certain that this doctrine formerly prevailed in England. But, in general, it does not appear to have prevailed (at least in an equal extent) in other countries. It seems there to have been admitted, that the lord might transfer the whole fee, without the consent of the vassal, and that the vassal immediately, by such a transfer, became the tenant of the new lord.—It seems also to have been admitted, that the lord might transfer to another the beneficial fruits of the tenure, without the consent of the vassal. But it was a great question whether the lord could transfer his vassal to another, without the vassal's consent, unless by transferring the whole fee.—See *Bosnage Commentaire de la Coutume de Normandie, des Feifs et Droits fodiaux*, Art. 204.—This necessity, which subsisted in our old law, that the tenant should consent to the alienation of the lord, gave rise to the doctrine of attornment. At the common law, attornment signified only the consent of the tenant to the grant of the seignory; or in other words, his consent to become the tenant of the new lord.—The necessity of attornment was, in some measure, avoided by the statute of Uses; as by that statute the possession was immediately executed to the use;—and by the statute of Wills, by which the legal estate is immediately vested in the devisee.—Yet attornment continued after this to be necessary in many cases. But both the necessity and efficacy of attornments have been almost totally taken away by the statutes of 4 Ann. c. 16. and 11 Geo. 2. c. 19. By the former of these statutes, sect. 9. it was enacted, "that all grants and conveyances of any manors or rents, or of the reversion or remainder of any messuages or lands, should be good without attornment of the tenants; provided that no such tenant should be damaged by payment of rent to any such grantor or conusor, or by breach of any condition for non-payment of rent before notice given him of such grant by the conusee or grantee." By the latter statute it was enacted, "That the attornment of tenants to strangers claiming title to the estate of their landlords, should be absolutely null and void to all intents and purposes whatsoever, and that the possession of their respective landlord or landlords, lessor or lessors, should not be deemed or construed to be anywise changed, altered, or affected by any such attornment or attornments; provided that nothing therein contained should extend to vacate or affect any attornment made pursuant to, and in consequence of, some judgment at law, or decree, or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee after the mortgage is become forfeited." Till the passing of these statutes, the doctrine of attornment was one of the most copious and obtruse points of the law. But these statutes having made attornment both unnecessary and inoperative, the learning upon it is so useless, that Mr. Viner has inserted nothing respecting it in his voluminous compilation but an extract from lord chief baron Gilbert.—Mr. Bacon has not the article Attornment in his work; and the learning and industry of lord chief baron Comyns have furnished him with little material upon it, that is not to be found either in Littleton or Sir Edward Coke. [*Butler*, Note 272.]

(B) By the feudal law the feudatory, we have seen, could not alien the feud without the consent of the lord, ante, p. 211, n. (A); neither could the lord alien or transfer his seignory without the consent of the feudatory, Wright Ten. 30. Feud, b. 2. t. 34. s. 1. Craig. de jure feud. 129. 374, 375; for the obligations of the superior and inferior being mutual and reciprocal, the feudatory was as much interested in the conduct and ability of the lord, as the lord was in the qualifications and ability of his feudatory. And as the lord could not alien, so neither could he exchange, mortgage, or otherwise dispose of his seignory, without the consent of his vassal. Wright. 31. Hence arose the doctrine of attornment, which is defined to be "the consent of the tenant to the grant of the seignory, or the reversion, putting the grantee into possession of the services due from such tenant." Gilb. Ten. 81. The reason for attornment, says Lord Ch. B. Gilbert, was threefold. 1st. That the tenant in possession might not be subjected to a stranger, or a new lord, without his own approbation and consent. 2d. That he might know to whom he was to render his services, and distinguish the lawful distress from the tortious taking of his cattle:

* It is to be understood, that there be two kinds of attornment, viz. an attornment in deed or express, and an attornment in law or implicit. Of attornment express or in deed Littleton, sect. 551. speaketh, and of attornment in law he speaketh after in this chapter. And to both these kinds of attornments, there is an incident inseparable, that is, that the tenant hath notice of the grant; for (an attornment being an agreement or consent to the grant, &c.) he cannot agree or consent to that which he knoweth not. And the usual pleading is, to which grant the tenant attorned. And therefore if a baili of a manor who used to receive the rents of the tenants, purchase the manor, and the tenants having no notice of the purchase, continue the payment of the rents to him, this is no attornment. So, if the lord levy a fine of the seignory, and by fine take back an estate in fee, the tenant continueth the payment of the rent to the first consor without notice of the fines, this is no attornment. But it is to be known, that there be two kinds of notices, viz. a notice in deed or express, whereof Littleton, sect. 551. speaketh, when he saith, that the tenant agreeth to the grant, and a notice in law or implied, whereof Littleton hereafter speaketh in this chapter.

(387)*
309 b.
Different
kinds of at-
tornment.

Lib. 2. fol. 67
b. Tooker's
case. 13 El.
Dyer, 302.
Tooker's
case, ubi su-
pra.

Lib. 2. Took-
er's case, ubi
supra.

* *ATTORNMENT* is, as if there be lord and tenant, and the lord will grant by his deed the services of his tenant to another for term of years, or for term of life, or in tail, or in fee, the tenant must attorn to the grantee in the life of the grantor (c)

(359)*
LITTLETON.
[Sect. 551.
309 a.]
Attornment
in deed.

and this reason was so prevalent, that when the statute *quia emptores terrorum*, gave a free alienation, in respect of the superior lord, yet the tenant's right of attornment continued unaltered. 3d. That by such attornment, the grantee of the reversion or seignory, might be put into the possession of it, and that others might be apprised and informed of the transfer.—Ibid. The necessity of attornment was partly avoided by the method of conveying to uses under the statute 27 H. 8. c. 10. by which the possession is immediately executed to the use. And it is now almost entirely taken away by the statutes 4 & 5 Ann. c. 16. and 11 Geo. 2. c. 19. The former of which enacts, that all grants or conveyances, by fine or otherwise, of any manors or rents, or of reversions or remainders, shall be effectual without the attornment of any of the tenants; but it is thereby provided, that no tenant shall be prejudiced by payment of rent to any grantor or consor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the consuee or grantee. And by the latter statute, reciting, that the possession of estates is rendered very precarious by the frequent and fraudulent practice of tenants, in attorning to strangers, who claim title to the estates of their respective landlords or lessors, who are thereby put out of the possession of their respective estates, and put to the difficulty and expense of recovering the same by action at law; it is therefore enacted, that all such attornments shall be void, and the possession not altered; but it is thereby provided, that the act shall not extend to affect any attornment made pursuant to any judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagees on a forfeited mortgage. Before the statute of Anne, attornment was necessary in the case of a mortgage, on the principle of notice to the tenant; but since that statute the conveyance is complete without attornment, and the mortgagee is entitled to the rents on notice. *Moss v. Gallimore*, Dougl. 265. Ante, p. 37. n. (z). And attornment is now seldom heard of in practice, except in the case of a recovery in ejectment, where the tenants frequently attorn to the lessor of the plaintiff, in order to save the expense of sheriff's poundage, and officer's fees, on executing a writ of possession.—[Ed.]

(c) That is, at common law, before the 4 & 5 Ann. c. 16. So, where a lord exchanged the services of his tenant with another for land, the attornment of the tenant, by whom the services were to be performed, was necessary to perfect such exchange. Perk. sect. 249. 259. And where a man made a lease for years of land, rendering rent, if he afterwards granted the reversion to another for years, to begin after the death of the grantor; the

by force and virtue of the grant, or otherwise the grant is void. And attornment is no other in effect, but when the tenant hath heard of the grant made by his lord, that the same tenant (hereafter in this chapter Littleton doth teach what manner of tenant shall attorn) do agree by word to the said grant (and so he may, and more safely, by his deed in writing), as to say to the grantee, *I agree to the grant made to you, (1), &c. or I am (2) well content with the grant made to you; but the most common attornment is, to say (3), Sir, I attorn to you by force of the said grant, or I become your tenant, &c. or (4) to deliver to the grantee a penny, or a halfpenny, or a farthing, by way of attornment.*

[COKE,
309 b.]
1. How made.
Might be by
words alone;
[COKE,
309 b.]

or by deliv-
ery of a thing
by way of at-
tornment.

310 a. Littleton here putteth five examples of an express attornment, but of them the last is the best, because the ear is not only a witness of the words, but the eye of the delivery of the penny, &c. and so there is *dictum et factum*. And any other words which import an agreement or assent to the grant, do amount to an attornment.

(360)*
And might be
made in the
grantee's ab-
sence.
(b) Lib. 2. fol.
68, 69. Took-
er's case.
28 H. 8. tit.
Attornment.
Br. 40. (10
Rep. 52. Cro.
Car. 440.
1 Rol. Abr.
300. (Dyer,
298 a.)

309 b.
And in some
cases was
good, not-
withstanding
an alteration
in the thing
granted.

*And albeit these five express attornments be all set down by Littleton, to be made to the person of the grantee (b), yet an attornment in the absence of the grantee is sufficient; for if he doth agree to the grant, either in his presence or in his absence, it is sufficient.

“Of the grant made by his lord.” Here is to be seen, when the thing granted is altered, what becometh of the attornment.

If there be lord, mesne, and tenant, and the mesne grant over his mesnalty by deed, the lord releaseth to the tenant, whereby the mesnalty is extinct, and there is a rent by surplusage, an attornment to the grant of this rent seck is good, although the quality of that part of the rent is altered, because it is altered by act in law.

If a reversion of two acres be granted by deed, and the lessor, before attornment, levy a fine of one of them, and the tenant attorn to the grantee by deed, this is good for the other acre.

(1) *Esc.* not in L. and M. nor Roh.
(2) *bien*, not in L. and M. nor Roh.

(3) *Esc.* added in L. and M. and Roh.
(4) *lierer—deliverer*, L. and M., and Roh.

attornment of the lessee for years in possession was necessary. So, where a lessee for twenty years made a lease over to a third person for ten years, rendering rent, and then granted the reversion to a stranger, attornment of the lessee for ten years was requisite: but if the lease for ten years had been made without any reservation of rent, it would have been otherwise. For it was a rule, that where there was no tenure, attendancy, rent, or service to be paid or done, there attornment was not necessary. *Supra*, 312 a. p. 356. And hence it was, that where a person granted common of pasture appendant or appurtenant, or estovers out of land, there needed no attornment of the tenant to make such grant good. And for the same reason, where a rent or common was granted to one for life, a subsequent grant of the reversion of it, was good without attornment. Also if a man had made a lease to one for ten years, and afterwards made a lease to another for twenty years, in this case the second lease was good for the ten years to come after the first ten years ended, without any attornment of the first lessee. *Sheph. Touch.* 255, 256.—[*Ed.*]

(c) If the reversion be granted of three acres, and the lessee agree to the said grant for one acre, this is good for all three; and so it is of an attornment in law, if the reversion of three acres be granted, and the lessee surrender one of the acres to the grantee, this attornment shall be good for the whole reversion of the three acres, according to the grant.

Attornment to the grant for part, was good for the whole.
(c) 18 E. 3. tit. Variance, 63.
22 E. 3. 18.
Tooker's case, ubi supra. (Post, 314.)

"*The tenant must attorn to the grantee in the life of the grantor, &c.*" And so must he also in the life of the grantee; and this is understood of a grant by deed. And the reason hereof is, for that every grant must take effect as to the substance thereof in the life both of the grantor and the grantee. And in this case, if the grantor dieth before attornment, the seignory, rent, reversion, or remainder, descend to his heir; and therefore after his decease the attornment cometh too late: so likewise, if the grantee dieth before attornment, an attornment to the heir *is void, for nothing descended to him: and if he should take, he should take it as a purchaser, where the heirs were added but as words of limitation of the estate, and not to take as purchasers.

309 a.
But it must have been made in the life of the grantor and grantee.
Vid. Litt. fol. 128. 11 H. 7.
19. Lib. 1. fol. 103. 106.
Shelley's case.
40 Ass. 19.
34 H. 6. 7.
20 H. 6. 7.
(Doct. & Stud. 86 a.)
*309 b.
(9 Rep. 84. Sect. 564.)

*But if the grant were by fine, then albeit the conusor or conusee dieth, yet the grant is good. For by fine levied the state doth pass to the conusee and his heirs; and the attornment to the conusee or his heirs at any time to make privy to distrain is sufficient. But all this is to be taken as Littleton understood it, viz. of such grants as have their operation by the common law. For since Littleton wrote, if a fine be levied of a seignory, &c. to another, to the use of a third person and his heirs, he and his heirs shall distrain without any attornment, because he is in by the statute of 27 H. 8. cap. 10. by transferring of the state to the use, and so he is in by act in law.

(361)*
Diversity herein when the grant was by fine.
34 H. 6. 7.
20 H. 6. 7.
Bract. lib. 2. fol. 81. 82. acc.
Lib. 6. fol. 63.
Sir Moyle Finch's case. or when the estate passed under the Statute of Uses;

And so it is, and for the same cause, if a man at this day by deed indented and inrolled according to the statute, bargaineth and selleth a seignory, &c. to another, the seignory shall pass to him without any attornment; and so it is of a rent, a reversion, and a remainder. So as the law is much changed, and the ancient privilege of tenants, donees, and lessees, much altered concerning attornment, since Littleton wrote.

(2 Cro. 193.
Post, 321. 6
Rep. 65.) 27
H. 8. cap. 16.
Vid. sect. 564.

But if the conusee of a fine, before any attornment by deed indented and inrolled, bargaineth and selleth the seignory to another, the bargainee shall not distrain, because the bargainor could not distrain. *Et sic de similibus*; for *nemo potest plus juris ad alium transferre quàm ipse habet*. Videt. sect. 149. where upon a recovery, the recoveror shall distrain and avow without attornment.

(Ante, 104 b.
Post, 321 b.
5 Rep. 113.)
Lib. 6. ubi supra. Vid.
sect. 149.

A grant to the king, or by the king to another, is good without attornment by his prerogative.

or in the king's case.
49 E. 3. 4. 24
H. 6. 8. 6 E.
4. 13. (Post,
314 b. 1 Rol.
Abr. 294.
Jones, 278.)

Sect. 564. 1 Rep. Altor Good's case. 8 Rep. 89. 1 Rol. Rep. 301. 1 Cro. 441.

314 b.
 6 Rep. 123.
 Sect. 551.
 Cro. Car. 284.
 1 Rep. 67 b.
 Sect. 579. 1
 Rol. Abr. 294.
 Ante 309 a.)
 (362)*
 (1 Sid. 139.
 1 Lev. 28.)
 309 b.
 2. To whom
 attornment
 was to be
 made.
 28 H. 6. 3.
 Tooker's
 case, ubi su-
 pra.

*310 a.
 Attornment
 to one of two
 grantees was
 good as to
 both;
 (Post, 313 a.
 Ante, 52 a.)
 287 b. 296 a.)
 Tooker's
 case, ubi su-
 pra. 11 H. 7.
 12.
 or if one died,
 attornment to
 the survivor
 was good:
 sicut as to
 attornment
 to remainder-
 man after ten-
 ant for life's
 decease.
 20 H. 6. 7.
 (Post 298 a.)
 Tooker's
 case, ubi su-
 pra. Pl. Com.
 187. 483.
 (Ante, 187 b.)
 Feme grantor
 marrying
 grantee, at-
 tornment to
 the husband
 was good.
 2 R. 2. tit.
 Attornment 8.
 Lib. 4. fol. 61.
 Hembling's
 case. (Mo. 91.
 con. 1 Lev. 58.)
 (363)*
 Attornment
 to cestui que
 use of a re-
 version was
 good;
 or if made to
 grantee for
 life, it was

Note, that in case of a deed, nothing passeth before attornment, as hath been said. In the case of the fine, the thing granted passeth as to the state, but not to distrain, &c. without attornment (D). In the case of the king, the thing granted doth pass both in estate and in privity to distrain, &c. *without attornment, unless it be of lands or tenements that are parcel of the duchy of Lancaster, and lie out of the county palatine (E).

"As to say to the grantee, &c." Here is to be seen to what manner of grantees the attornment is good. Regularly the attornment must be according to the grant, either expressly or impliedly. Of the first Littleton hath here spoken.

*Impliedly, as if a reversion be granted to two by deed, and the lessee attorn to one of them according to the grant, this attornment is good, but not to vest the reversion only in him to whom attornment is made; but it shall enure to both the grantees, for that is according to the grant, and for that it cannot vest the reversion only in him to whom the attornment is made. And so it is if one grantee dieth, the attornment to the survivor is good.

If the lord grant by deed his seignory to A. for life, the remainder to B. in fee, A. dieth, and then the tenant attorn to B., this attornment is void, because it is not according to the grant; for then B. should have a remainder without any particular estate.

If a reversion be granted to a man and a woman, they are to have moieties in law; but if they intermarry, and then attornment is had, they shall have no moieties (and yet by the purport of the grant they are to have moieties), because it is by act in law (F).

If a feme grant a reversion to a man in fee, and marry with the grantee, the lessee attorn to the husband, this is a good attornment in law to the husband (G).

*If a reversion be granted by deed to the use of J. S., and the lessee hearing the deed read, or having notice of the contents thereof, attorn to *cestui que use*, this is an implied attornment to the grantee.

If a reversion be granted for life, the remainder in tail, the remainder in fee, the attornment to the grantee for life shall enure to

(D) See n. (L 1) infra.—[Ed.]

(E) Acc. 4 Inst. 209. Plowd. 221 b; but later authorities have held otherwise. See 1 Sid. 139. Lev. 28.—[Ed.]

(F) The attornment in this case was good, because the words of the grant might still have their effect according to the purport of it, though the quality of the grantee's estate was different from what it would have been, if the tenant had attorned before marriage. Hawk. Abr. 410, 411.—[Ed.]

(G) But if the feme had married any other person than the grantee before attornment, it would have been an implied countermand of the attornment, because it would then be to the husband's prejudice, by defeating his estate for the life of the wife, which he had gained by the marriage. Infra, 310 b.—[Ed.]

them in the remainder, to vest the remainder in them. And in those cases if the tenant should say, that I do attorn to the grantee for life, but that it shall not benefit any of them in remainder after his death, yet the attornment is good to them all; for having attorned to the tenant for life, the law (which he cannot control) doth vest all the remainders.

good as to the remainder-man.
Temps E. 1.
Attorn. 22.
18 E. 4. 7.
(Ante, 212 b.
Post, 312 b.
6 Rep. 63.
5 Rep. Ford's
case. 1 Rol.
Abr. 412.
3 Lev. 17.
4 Lev. 23.)

And of this more shall be said hereafter in this chapter (H).

ALSO, if the lord grant the service of his tenant to one man, and after by his deed, bearing a later date, he grant the same services to another, and the tenant attorn to the second grantee, now the said (5) grantee hath the services; and albeit afterwards the tenant will attorn to the first grantee, this is clearly void, &c.

LITTLETON.
[Sect. 552.
310 a.]
After attorn-
ment to the
second of two
several gran-
tees, it could
not be made
to the first.

Here it is to be observed, that Littleton expresseth not what estate is granted, and very materially: for if the former grant were in fee, and the latter grant were for life, and the tenant doth first attorn to the second grantee, he cannot after attorn to the first grantee to make the fee-simple pass, for that should not be according to the grant; but in that case the attornment to the first is countermanded.

310 a.
(Cr., Car. 284.
1 Rol. Abr. 500.
Post, 336 a.)

And so it is if a reversion, expectant upon an estate for life, be granted to another in fee, and after the grantor before attornment confirm the estate of the lessee in tail, the attornment to the grantee for the fee-simple is void (I).

Nor when the
grantor, be-
fore attorn-
ment to the
grantee of the
reversion,
confirmed to
the tenant in
tail, &c.;
(364)*

*In the same manner, if a reversion upon an estate for years be granted in fee, and the lessor confirm the estate of the lessee for life, he cannot afterwards attorn.

*If a feme sole maketh a lease for life or years, reserving a rent, and granteth the reversion in fee, and taketh husband, this is a countermand of the attornment.

310 b.
or where a
feme grantor
married be-
fore attorn-
ment to the
grantee.
11 H. 7. 19.
2 R. 2. ubi su-
pra.
P. 3 Eliz.
Hendoes.
Hemling's

Where our author putteth his case of the whole reversion, if two coparceners be of a reversion, and one of them granteth her moiety

(5) *dit—second*, L. and M. and Roh.

(H) But where the reversion was granted to one for life, the remainder to another in fee, if the tenant attorned not to the tenant for life, he could not attorn to the remainder-man; because, if there were no particular estate, there could be no remainder; and there could be no particular estate, unless the tenant gave him possession by his attornment. Gilb. Ten. 84.—[Ed.]

(I) For the tenant, after the acceptance of such confirmation, could not put the grantee in possession according to the grant, because the reversion was altered by such his acceptance; and since he could not put the grantee in possession of the thing as it was granted, he could make no attornment at all; for his attornment could not vary or alter the original grant; as otherwise no person could have told by such grants in whom the reversion or seignory was lodged; and so the notoriety of the attornment (which, it is probable, was anciently made *coram paribus*), as correspondent to such grants, would have been altogether destroyed. Gilb. Ten. 83, 84.—[Ed.]

case, ubi supra. (1 Rol. Abr. 299.)

by fine, the conusee shall have a *quid juris clamat* for the moiety.

Attornment to two several grantees was void; 11 H. 7. 12. or to two grants to the same person; or to one person in two distinct capacities.

(Ante, 190 a. Mo. 84.)

If in the case that our author here putteth of several grantees, if the tenant attorn to both of them, the attornment is void, because it is not according to the grant. If a reversion be granted for life, and after it is granted to the same grantee for years, and the lessee attorneth to both grants, it is void for the uncertainty; *à multo fortiori*, if the lord by one deed grant his seignory to I. bishop of London, and to his heirs, and by another deed to I. bishop of London, and to his successors, and the tenant attorn to both grants, the attornment is void; for albeit the grantee be but one, yet he hath several capacities, and the grants are several, and the attornment is not according to either of the grants (x).

But attornment to a grant of Black Acre or White Acre, was good after election. (365)*

But if A. grant the reversion of Black Acre or White Acre, and the lessee attorn to the grant, and after the grantee maketh his election, this attornment is good; for albeit the state was uncertain, yet he attorned to the grant in such sort as it was made: and so note a diversity between one grant* and several grants, and observe in this case an attornment good in expectation, and yet nothing passed at the time of the attornment, but by the election subsequent.

LITTLETON. [Sect. 553. 310 b.]

3. By whom attornment was to be made. On grant of a manor part in demesne, and part in service, all the tenants ought to attorn, except tenants at will;

311 a. or tenants by copy.

ALSO, if a man be seised of a manor, which manor is parcel in demesne, and parcel in service, if he will alien this manor to another, it behoveth that by force of the alienation, all the tenants which hold of the alienor, as of his manor (6), do attorn to the alienee, or otherwise the services remain continually in the alienor (1), saving the tenants at will (7); for it needeth not that tenants at will do attorn upon such alienation, &c. (8).

“*Saving the tenants at will, &c.*” Here is implied tenant at will or by copy of court-roll according to the custom of the manor, so as the freehold and inheritance both of lands in the hands of tenant at will by the common law, or by custom, shall pass both in right and in possession without any attornment (1).

310 b. Tempe E. 2. Attornment. 43 E. 3. 16. (Sld. 310. 312.)

Here it is to be observed, that when a man maketh a feoffment of a manor, the services do not pass, but remain in the feoffor, until the freeholders do attorn; and when they do attorn, the attornment

(6) &c. added in L. and M. and Roh.

(7) &c. added in L. and M. and Roh.

(8) *pur ceo que mesmes les terres et tene-*

ments que ils teignent a volonte passent al aliene per force de tiel alienation, added in L. and M. and Roh. and in MSS.

(x) If a person had granted a reversion to one, and before the attornment of the tenant he sold the reversion to a third, in this case the tenant might have attorned to the second grantee, and it would have made the grant good to him. But if the attornment had been made to both the grantees, it would have been void for uncertainty. 11 H. 7. 1 a. 6 Co. 68. —[Ed.]

(1) Supra, p. 357. n. (a). —[Ed.]

(1) For the difference between seisin and attornment, see Brediman's case, 6 Rep. 56 b. —[Butler.]

shall have relation to some purpose, and not to other. For albeit the attornment be made many years after the feoffment, yet it shall have relation to make it pass out of the feoffor *ab initio*, even by the livery upon the feoffment, but not to charge the tenants with any mean arrearages, or for waste in the mean time, or the like.

If a reversion of land be granted to an alien by deed, and before attornment the alien is made denizen, and then the attornment is made, the king, upon office found, shall have the land: for as to the estate between the parties, it passeth by the deed *ab initio* (m).

*If a man plead a feoffment of a manor, he need not plead an attornment of the tenants; (but if it be material,) it must be denied or pleaded of the other side.

And upon consideration had of all the books touching this point, whether the services of the freeholders do pass, wherein there have been three several opinions, viz. some have holden that the services do pass in the right by the livery as parcel of the manor, but not to avow without attornment, as in the case of the fine. And others have holden, that they both pass in right and in possession to distrain without attornment. And the third opinion is, that in this case the said services pass neither in possession nor in right, but until attornment *remain continually in the alienor, as Littleton here holdeth. And so it was resolved, Pasch. 15 Eliz. between Brabitch and Barwell, according to the opinion of our author. And I never yet knew any of Littleton's cases (albeit I have known many of them) to be brought in question, but in the end the judges concurred with our author.

And where our author speaketh of the attornment of the freeholders, if the lord make a lease for years or for life, of a manor, and the freeholders attorn to the lessee, if after the reversion of the manor be granted, the attornment of the lessee for years or life shall bind the freeholders; for by their former attornment they have put the attornment into the mouth of the lessee.

ALSO, if there be lord and tenant, and the tenant letteth the land to another for term of life, or giveth the land in tail, saving the reversion to himself, &c. ("&c." that is to say, without limitation of any remainder over; and this is but to make his opinion plain as to the point that he putteth it), if the lord in such case grant his seignory to another, it behoveth that he in the reversion attorn to the grantee, and not the tenant for term of life,

(m) But in respect of a stranger, attornment had no relation. And therefore if two deeds were made at several times, and the grantee, whose deed was last in order of time, got attornment made to him first, the reversion passed to him; and though attornment were afterwards made to the other grantee, this would not help him by relation. Neither would it have made any difference, if the former grant of the reversion had been in fee, and the latter for life only. Shep. Touch. 266. That estates depending on conditions precedent, cannot vest even by relation, till the performance of the condition, see 2 Leon. 139.—[Ed.]

372. Ante.
263 a. Post.
341 a. 3 R. p.
29. 1 Lev. 206.)

(2 Rol. Abr.
394, 256. Plow.
432 b. 433 a.
Ante, 270 b.
279 b.)

(366)*
Pasch. 5. E. 3.
Coram Rege.
Sussex in
Thesaur.

21 E. 3. 47.
34 E. 3. Double Plea. 24.
42 Ass. p. 6.
43 Ass. p. 20.
30 E. 3. 29 E.
3. 26 E. 3.
per quas servitia 21. 8 H.
4. 1 b. 12 H. 4.
20 H. 6. 7.
36 H. 6. 9 E.
4. 33. 13 H. 7.
14 a. 1 H. 7.
31. 4 E. 6.
Attornment,
Br. 30.
*311 a.
Vid. Hill.
14 Eliz. Rot.
508. in Comuni Banco.

After attornment by the freeholders to lessee of a manor, his attornment to the grantee of the reversion was sufficient.
9 E. 2. tit. Attornment 13 b. 19 E. 2.
1b. 19 E. 2.
3. 47. 5 H. 5.
12 b. Vid.
Litt. sect. 549.
& 556.

LITTLETON.
[Sect. 554.
311 a.]
Attornment to a grant of a reversion ought to be

made by the tenant immediately privy to the grantor.

[COKE,

311 a.]
(367)*

311 a.
(8 Rep. 42)

*or the tenant in tail, because that in *this case he in the reversion is tenant to the lord, and not the tenant for term of life, nor the tenant in tail (N).*

For it is a maxim in law, that no man shall attorn to any grant of any seignory, rent service, reversion, or remainder, but he that is immediately privy to the grantor ; and because in this case there is no privy between the lord and the tenant for life, or donee in tail, but only between the lord and him in the reversion ; for in this case the attornment of him in the reversion only is good.

LITTLETON.
[Sect. 555.

311 a.]

*311 b.

IN the same manner is it, where there are lord, mesne, and tenant, (9) if the lord will grant the services of the mesne, albeit he maketh no mention in his grant of the mesne, yet the mesne ought to attorn (10), &c. and not the tenant peravail, &c. for that the mesne is tenant unto him, &c.*

311 b.

This standeth upon the same reason that the next precedent case did.

LITTLETON.

[Sect. 556.

311 b.]

Diversity
herein be-
tween a rent-
service, and
a rent-charge
or rent-seck.

BUT otherwise it is where certain land is charged with a rent-charge or rent-seck ; for in such case if he which hath the rent-charge grant this to another, it behoveth that the tenant of the freehold attorn to the grantee, for that the freehold is charged with the rent, &c. And in a rent-charge, no avowry ought to be made upon any person for the distress, taken, &c. but he shall avow the prisel to be good and rightful, as in lands or tenements so charged with his distress, &c.

311 b.
(6 Rep. 69 a.)
(368)*
21 H. 6. 9 b.
(2 Rep. 67.)

Here is to be observed a diversity between a rent-service and a rent-charge, or a rent-seck ; for as to the rent-service, *no man (as hath been said) can attorn, but he that is privy ; so in case of a rent-charge, it behoveth that the tenant of the freehold doth attorn to the grantee, without respect of any privy. And therefore the disseisor only, in the case of a grant of a rent-charge, shall attorn, because he is (as Littleton saith) tenant of the freehold ; but in case of a grant of a rent-service, the attornment of a disseisee sufficeth (o).

(9) *si—et*, L. and M. and Roh.

(10) *Et c.* not in L. and M. nor Roh.

(N) The cases put by Littleton in this and the three following sections, depend on this rule, namely, that he that owes the services must make the attornment ; and therefore where the tenant in fee made an estate for life, yet he remained tenant to the very lord, and ought to have attorned to the grant of the seignory ; but if he had made a lease for life, the remainder in fee, the tenant for life would have been the proper person to attorn to such grant ; for this would have been an alienation in fee, and the tenant for life, by virtue of the statute of *quia emptores*, would have held of the chief lord ; for otherwise a new tenure would have been created, if the tenant for life had held of the remainder-man, and he to hold over ; and since the statute no man can erect a new tenure. Gilb. Ten. 84, 85.—[*Ed.*]

(o) In the case of a rent-service, notwithstanding the tenant was disseised, he yet might have attorned to the lord, because the feudal contract continued. But to the grant of a rent-charge, or rent-seck, the tenant of the land must have attorned, because the land only was

If there be lord and tenant by homage, fealty, and rent, the tenant is disseised, the lord granteth the rent to another, the disseisee attorneth, this is void : but if he had granted over his whole seignory, the attornment had been good ; and the reason of this diversity is here given by our author, for that when the rent was granted only, it passed as a rent-seck, and consequently the disseisor being terretenant, must attorn. But when the seignory is granted, then the disseisee in respect of the privity may attorn. (3 Rep. 39 a.)

"It behoveth that the tenant of the freehold, &c." And therefore if the tenant of the land charged with a rent-charge or a rent-seck make a lease for life, and he that hath the rent-charge or rent-seck granteth it over, the tenant for life shall attorn, for he is tenant of the freehold, according to the express saying of our author, and (as hath been said) there needeth no privity.

And it was holden by Dyer, chief justice of the court of common pleas, and Mounson, justice, in the argument of Bracebridge's case abovesaid, and not denied, that if he that hath a rent-charge granteth it over for life, and the tenant of the land attorn thereunto, and after he granteth the reversion of the rent-charge, that the grantee for life may attorn alone ; and that these words of Littleton are to be understood when a rent-charge or rent-seck is granted in possession : and therewith agreeth 46 E. 3. where it appeareth, that the *quid juris clamat* (P), in that case, did lie against the grantee for life. (1 Leon. 265 a.)

* A man maketh a lease for life, and after grants to A. a rent-charge out of the reversion, A. granteth the rent over, he in the reversion must attorn, and not the tenant of the freehold, for that the freehold is not charged with the rent ; for a release made to him by the grantee doth not extinguish the rent. And Littleton is to be understood, that the tenant of the freehold must attorn when the freehold is charged. (369)*
46 E. 3. 27.
2 H. 6. 9. Vid.
Litt. sect. 549.
& 553.

* *"And in a rent-charge no avowry ought to be made upon any person, &c."* This is the reason that Littleton giveth of the difference between the rent-service and the rent-charge. Now it may be said, that this reason is taken away by the statute of 21 H. 8. for by that statute the lord needs not avow for any rent or service upon any person in certain : and then by Littleton's reason there needeth no privity to the attornment of a seignory ; for (say they) *cessante causa vel ratione legis, cessat lex*, as at the common law no aid was grantable of a stranger to an avowry ; because the avowry was made of a certain person : but now the avowry being made by the said act of 21 H. 8. upon no person, therefore the reason of the law being changed, the law itself is also changed ; and consequently in an avowry according to that act, aid shall be granted *312 a.
21 H. 8. cap.
19. Vid. sect.
464.
27 H. 8. 4 b.
(Doc. Plac.
25, 26.)

liable, and no one else, but as tenant of the land ; and therefore the land being to yield the rent, the tenant of the land was the only person to consent to such grants, and to put the grantee into possession. Gilb. Ten. 84, 85.—[Ed.]

(P) As to this writ, see n. (L 1) infra.—[Ed.]

of any man, and the like in many other cases; which case is granted to be good law; but albeit the lord (as hath been said) may take benefit of the statute, yet may he avow still at his election upon the person of his tenant. And albeit the manner of the avowry be altered, yet the privity (which is the true cause of the said difference) remaineth still as to an attornment.

LITTLETON.
[Sect. 557.
312 a.]

The tenant having made a lease for life, remainder to another in fee, attornment of lessee for life to the lord's grant of the services, was good.

(370)*

*ALSO, if there be lord and tenant, and the tenant letteth his tenement to another for term of life, the remainder to another in fee, and after the lord grant the services to another, &c. and the tenant for life attorn; this is good enough, for that the tenant for life is tenant in this case to the lord, &c. and he in the remainder cannot be said to be tenant to the lord, as to this intent, until after the death of the tenant for life: yet in this case if he in the remainder dieth without heir, the lord shall have the remainder by way of escheat, because that albeit the lord in such case (11) ought to avow upon the tenant for life, &c. yet the whole entire tenement, as to all the estates *of the freehold, or of fee-simple, or otherwise, &c. in such case are together holden of the lord, &c.*

*312 b.

(12)* *"But not to make avowry upon them altogether. M. 3 H. 6."*

312 b.
M. 3 H. 6. 1.

This is added to Littleton, but it is consonant to law, and the authority truly cited.

On grant of the seignory for life, remainder in fee, attornment to grantee for life was good as to the remainder.

15 E. 3. Attorn. 10.
12 E. 4. 4.
18 H. 6. 2.
9 E. 2. tit. Attorn. 18. 18 E. 4. 7. Tempe E. 4. Attorn. 22. Vid. sect. 550. (3 Rep. 66. Ante, 310 a. Post, 320 b.)

(9 Rep. 134 b. Post, 290 a.)

"And the tenant for life attorn, &c." For he that is (as hath been said) privy and immediately tenant to the lord must attorn; and that is in this case the tenant for life: and so of the other side, if a seignory be granted to one for life, the remainder to another in fee, the attornment to the tenant for life is an attornment to the remainder also; [unless it be that they in the remainder (A)] ought to have acquittal, or other privilege (whereof they should be prejudiced); and then albeit an attornment be had to the tenant for life, and he acknowledge the acquittal, &c. yet after his decease, he in remainder shall not distrain until he acknowledge the acquittal, notwithstanding the attornment to the tenant for life.

3 H. 6. 1. Old Tenures, 107.
(d) 15 E. 4. 12a.
(1 Leon. 225.)

"Shall have the remainder by way of escheat." For the remainder is holden of the lord, but not immediately holden; and in this case, by the escheat of the remainder, the seignory is extinct: for the fee-simple of the seignory being extinct, there cannot remain a particular estate for life thereof, in respect of the tenure and attendance over; and of this opinion is Littleton (d) himself in our

(11) *covient d'avouer—d'avouera*, L. and M. and Roh.

(12) This paragraph not in L., M. nor Roh.

(A) *Here it seems that the text should be understood as if Lord Coke had said, "unless it be that they who attorned, &c." instead of "unless it be that they in the remainder, &c."* See Mr. Ritso's Intro. p. 120. [Note from the 18th London edition, 1823.]

books. But otherwise it is of a rent-charge in fee; for if that be granted for life, and after he in the reversion purchase the land, so as the reversion of the rent-charge is extinct, yet the grantee for life shall enjoy the rent during his life, for there is no tenure or attendance in this case.

*ALSO, if there be lord and tenant, and the tenant letteth the tenements to a woman for life, the remainder over in fee, and the woman taketh husband, and after the lord grant the services, &c. to the husband and his heirs; in this case the *service is put in suspense during the coverture. But if the wife die living the husband, the husband and his heirs shall have the rent of them in the remainder, &c. And in this case there needeth no attornment by parol, &c. for that the husband, which ought to attorn, accepted the deed of grant of the services, &c. the which acceptance is an attornment in the law.*

LITTLETON.
[Sect. 558.
313 b.]

4. Attornment in law. On grant of services to the husband of the tenant, his acceptance of the grant was an attornment in law. (371)*

"The which acceptance is an attornment in the law, &c." Littleton having spoken (as hath been said) of attornments in deed, or express, now cometh to speak of attornments in law, or implied: and having before set down five express attornments in deed, doth in this chapter enumerate seven attornments in law. Here it is to be understood, that the express attornment of the husband will bind the wife after the *coverture, and inasmuch as this acceptance of the grant is an attornment in law, without a word of attornment the seignory shall pass. And this is the first example, that Littleton putteth of an attornment in law, which amounteth to an express attornment, for that it is an agreement to the grant.

312 b.

9 E. 3. 42. 15
E. 3. Attornment 11. (6
Rep. 63. 9
Rep. 55. 2
Rol. Abr. 401.)

*313 a.

44 E. 3. tit.
Fines 37. 11
E. 4. 4. (1 Rol.
Abr. 303.)
(Post, 260 a.
301. Ante,
310.)

If the lord grant his seignory to the tenant of the land, and to a stranger, and the tenant accept the deed, this acceptance is a good attornment to extinguish the one moiety, and to vest the other moiety in the grantee, as hath been said.

IN the same manner is it, if there be lord and tenant, and the tenant taketh wife, and after the lord grant the services to the wife and her heirs, and the husband accepteth the deed; in this case, after the death of the husband, the wife and her heirs shall have the services, &c. for by the acceptance (13) of the deed by the husband, this is a good attornment, &c. albeit during the coverture, the services shall be put in suspense, &c.

LITTLETON.
[Sect. 569.
313 a.]

So if the grant was made to the wife of the tenant and he accepted the deed.

Here is the second example that Littleton putteth of an attornment in law, and standeth upon the former reason.

313 a.

(1 Rol. Abr.
936, 939, 940.)

"Shall be put in suspense." Suspense cometh of *suspendeo*, and in legal understanding is taken when a seignory, rent, profit appender, &c. by reason of unity of possession of the seignory, rent, &c. and of the land out of which they *issue, are not *in esse* for a time, *et tunc dormiunt*, but may be revived or awaked. And

(Ante, 143 b.)
(4 Rep. 52.)
(Cro. Car.
161.)

(372)*

they are said to be extinguished when they are gone for ever, *et tunc moriuntur*, and can never be revived; that is, when one man hath as high and purdurable an estate in the one as in the other (a).

LITTLETON.
[Sect. 560.

313 a.]
So if the tenant made a lease for life, remainder to another in fee, and the services were granted to the lessee for life, his acceptance of the deed was an attornment in law, (in which case the services were suspended for life only;
313 a.

ALSO, if there be lord and tenant, and the tenant grant the tenements to a man for term of his life, the remainder to another in fee, if the lord grant the services to the tenant for life (14) in fee, in this case the tenant for term of life hath a fee in the services; but the services are put in suspense during his life. But the heirs (15) of the tenant for life shall have the services after (16) his decease, &c. (17). And in this case there needeth (18) no attornment, for by the acceptance of the deed by him which ought to attorn, &c. this is an attornment of itself (19).

Here is the third case that Littleton putteth of an attornment in law. And it is to be observed, that albeit a grant, as hath been said, may enure by way of release, and a release to the tenant for life doth work an absolute extinguishment, whereof he in the remainder shall take benefit, yet the law shall never make any construction against the purport of the grant to the prejudice of any, or against the meaning of the parties, as *here it should; for if by *construction it should enure to a release, the heirs of the tenant for life should be disherited of the rent; and therefore Littleton here saith, that the heirs of the grantee shall have the seignory after his death. And here is an attornment in law to a grant suspended that cannot take effect in the grantee so long as he liveth, but shall take effect in his heirs by descent; for the inheritance of the seignory was in the tenant for life, and the suspension only during his life.

(Sider. 25.)
*313 b.
(362)*

LITTLETON.
[Sect. 561.

313 b.]
secus where the grantee held in fee-simple.)

BUT where the tenant hath as great and as high estate in the tenements as the lord hath in the seignory; in such case, if the lord grant the services to the tenant in fee, this shall enure by way of extinguishment. Causa patet.

- (14) *enfee* not in L. and M. nor Roh.
(15) *le tenant a terme de vie*, not in L. and M. nor Roh.
(16) *son*, not in L. and M. nor Roh.

- (17) *&c.* not in L. and M. nor Roh.
(18) *ascun*, added in L. and M. and Roh.
(19) *&c.* added in L. and M. and Roh.

(a) Suspension is a partial extinguishment, or extinguishment for a time. Extinguishment is the annihilation of a collateral thing or subject, in the subject itself out of which it is derived: as in the instances here put of a seignory, rent, &c. Suspension is merely for a time, because the party whose interest is to be suspended, has a particular estate: or because he has a defeasible interest, so that the subject itself, or the estate therein, may revive, when there shall be a separation of these interests, which, if they were absolutely united, would be extinguished. These two acts of law differ from merger, which is the annihilation of one estate in another. That the estate in the seignory, rent, or common, ceases, is the consequence of the extinguishment of the subject itself. When the subject ceases, the estate therein must also cease. Under the doctrine of merger the subject may continue after the annihilation of one estate in another; for, notwithstanding the annihilation of the estate, the subject continues, and the effect of the merger is only to involve the time of one estate in the time of another estate, or, at the utmost, to accelerate the right of possession under the more remote estate. Thus suspension and extinguishment, correctly taken, are applicable rather to the things themselves, than to the estates or degrees of interest therein. 3 Prest. Conv. 9—11.—[Ed.]

Here Littleton intendeth not only as great and high an estate, but as purdurable also, as hath been said; for a disseisor or tenant in fee upon condition hath as high and great an estate, but not so purdurable an estate, as shall make an extinguishment. 313 b.

ALSO, if there be lord and tenant, and the tenant maketh a lease to a man for term of his life, saving the reversion to himself, if the lord grant the seignory to tenant for life in fee, in this case it behoveth that he in the reversion must attorn to the tenant for life by force of this grant, or otherwise the grant is void, for that he in the reversion is tenant to the lord, &c.

LITTLETON.
[Sect. 562.
313 b.]
But where the tenant made a lease for life, saving the reversion to himself, his attornment was necessary to a grant of the seignory to the lessee for life.

(20) Yet he shall not hold of the tenant for life, during his life. Causa patet, &c.

"Yet he shall not *hold, &c." This is added, and not in the original, and is against law, and therefore to be rejected. *341 a.

Here in this case he in the reversion of the tenancy must attorn, because he is the tenant to the lord; and yet the seignory shall be suspended during the life of the grantee, because he hath an estate for life in the tenancy, but his heirs shall enjoy the seignory by descent (s). 313 b.
(In which case the seignory was suspended during the grantee's life.)

"Tenant to the lord, &c." Here is to be understood a diversity, when the whole estate in the seignory is suspended, and when but part of the estate in the seignory is suspended. And in this case the seignory is suspended but for term of life; (e) and therefore as to all things concerning the right it hath his being; but as to the possession during the particular estate the grantee shall take no benefit of it: therefore during that time he shall have no rent service, wardship, relief, heriot, or the like, because these belong to the possession: but if the tenant dieth without heir, the tenancy shall escheat unto the grantee, for that is in the right; and yet when the seignory is revived by the death of the tenant, there shall be wardship: as if the tenant marry with the seignores and dieth, his heir (374)

(e) 34 Ass. p. 15.

16 E. 3. tk. Voucher, 88.

(20) This paragraph not in L. and M. nor Rob.

(s) If a disseisor makes a lease for life, the remainder in fee, and the disseisee releases to the tenant for life, this shall enure to him in the remainder, because the release cannot alter the notoriety of the feudal feoffment, post, 276 a; but the release of the feudal lord to the tenant for life, did not enure to him in the remainder, because the feudal feoffment was not prejudiced, but stood in full force, whether it enured one way or the other, and therefore it was held to enure exclusively to the benefit of him that purchased such seignory. But in the case of tenant for life, the reversion in fee, if the lord granted the services to the tenant for life, it was necessary that the reversioner should attorn, because he held of the lord: such attornment, however, made no alteration in the tenure of the estate for life, nor in the least degree discharged the tenant from his fealty and services. But the tenure, which the tenant for life purchased, was suspended, during the continuance of the estate for life, as to all the *possessory* fruits of such tenure; for he could not exercise the prerogatives of a lord over one to whom he owed fealty, and therefore he could have no wardship, marriage, or relief, of the reversioner: but, if the reversioner died without heir, the reversion escheated to the grantee, because that is in the right. Infra, 314 a. Gilb. Ten. 87, 88. —[Ed.]

within age, the wife shall have the wardship of the heir. Also in the case that Littleton here putteth, albeit the seignory be suspended but for life, yet some hold that he cannot grant it over, because the grantee took it suspended, and it was never *in esse* in him. But if the tenant make a lease for years, or for life, to the lord, there the lord may grant it over, because the seignory was *in esse* in him, and the fee-simple of the seignory is not suspended. But if the lord disseise the tenant, or the tenant enfeoff the lord upon condition, there the whole estate in the seignory is suspended, and therefore he cannot during the suspension take benefit of any escheat, or grant over his seignory (τ).

5 E. 2.
Twong's
case. (Post,
298 b.)

LITTLETON.
[Sect. 563.
314 a.]
Payment of
part of the
services, was
a good attorn-
ment in law
for the whole.
(375)*

*ALSO, if there be lord and tenant, and the tenant holdeth of the lord by twenty manner of services, and the lord grant *his seignory to another; if the tenant pay in deed any parcel of any of the services to the grantee, this is a good attornment, of and for all the services, albeit the intent of the tenant was to attorn but for this parcel, for that the seignory is (21) entire, although there be divers manner of services which the tenant ought to do, &c.*

314 a.
4 E. 3. 55.
Maiman's
case. 29 E.
3. 22. 6 E. 4. 2.
22 Ass. 65.
7 E. 4. 10.
35 H. 6. 8.
per Priault.
(Ante, 309 b.)
40 E. 3. 34.
(4 Rep. 8.)

Here it appeareth that an attornment being made for parcel, is good for the whole; for seeing he hath attorned for part, it cannot be void for that, and good it cannot be unless it be for the whole: but of this sufficient hath been said before in this Chapter.

"Pay any parcel of the services, &c." Here is the fourth example of an attornment in law; for payment of any parcel of the services is an agreement in law to the grant.

LITTLETON.
[Sect. 564.
314 b.]
Judgment for
conuise in a
sci. fa. for
any part of
the services,
was a good
attornment
in law for the
whole.

ALSO, if there be lord and tenant, and the tenant holdeth of the lord by many kind of services, and the lord grant the services to another by fine; if the grantee sue a scire facias out of the same fine for any parcel of the services, and hath judgment to recover, this judgment is a good attornment in law for all the services (22).

314 b.
48 E. 3. 24.
3 E. 3. quod
juris clamat.
4 E. 3. 28. 29.
37 H. 6. 14.
per Moyle.
17 E. 3. 29.
(Post, 246 b.)
6 Rep. 64 b.)

Here is to be observed, that this judgment in the *scire facias* (which is no more but that the demandant shall have execution, &c.) is a good attornment, albeit it is presumed that *judicium redditur in invitum*, and that an attornment in law of any part is good for the whole. And this is the fifth example that Littleton putteth of an attornment in law.

LITTLETON.
[Sect. 573.
317 a.]

ALSO, if a man let land to another for his life, and after he confirm by his deed the estate of the tenant for life, the remainder

(21) *forasque un et*, added in L. and M. (22) *&c.* added in L. and M. and Roh. and Roh.

(τ) For the lord by the common law, in the first case, and by the statute of *quia emptores*, in the second, holds of the next superior lord, and he has no seignory distinct from the land itself. Gilb. Ten. 88.—[Ed.]

to another in fee (of this sufficient is said in the Chapter of Confirmation, sect. 525.), *and the tenant for life accepteth the deed, then is the remainder in fait in him to whom the remainder is given or limited by the same deed* (23). *For by the acceptance of the tenant for life* (24) *of the deed, this is an agreement of him, and so an attornment* in law. But yet he in the remainder shall not have any action *of waste, nor other benefit by such remainder, unless that he hath the said deed in hand, whereby the remainder was intailed or granted to him.* (And albeit he hath no remedy to come to the deed during the life of tenant for life, yet because he is privy in estate, he shall not maintain an action of waste without showing the deed; but when the remainder is once executed, he shall not need to show the deed). *And because that in such case the tenant for life peradventure will* (25) *retain the deed to him, to this intent, that he in the remainder should not have any action of waste against him, for that he cannot come to have the deed in his possession,* (26) *it will be a good* (27) *and sure thing in such case for him in the remainder, that a deed indented be made by him which will make such confirmation, and the remainder over, &c. and that he which maketh such confirmation deliver one part of the indenture to the tenant for life, and the other part to him that shall have the remainder. And then he by showing of that part of the indenture may have an action of waste against the tenant for life, and all other advantages that he in the remainder may have in such a case, &c.*

Here Littleton putteth a case of a remainder whereunto an attornment is requisite. And this is the sixth example of an attornment in law.

“It will be a good and sure thing.” Hereby it appeareth how necessary it is to use learned advice in a man's conveyance, for thereby shall be prevented many questions, and not to follow the advice of him that is experimented only. For as in physic, *Nullum medicamentum est idem omnibus*, so in law one form or precedent of conveyance will not fit all cases.

*ALSO, if a man let lands or tenements to another for term of years, and after he oust his termor, and thereof enfeoffo another in fee, and after the tenant for years enter upon the feoffee, claiming his term, &c. and after doth waste; *in this case the feoffee shall have by law a writ of waste against him, and yet he did not attorn* (28) *unto him. And the cause is, as I suppose, for that he which hath right to have lands or tenements for years,* (29) *or otherwise, should not by law be misconusant of the feoffments which were made of and upon the same lands, &c.*

On lessor confirming to his lessee for life, remainder to another in fee, the lessee's acceptance of the deed was a good attornment in law as to the remainder. (Plowd. 25 b.) [COKE, 317 b.] (376)* *317 b. [COKE, 317 b.] 17 E. 3. Confirmation. 4. 36 H. 6. fol. 8. 14 H. 8. Pl. Com. 149, in Throckmorton's case.

317 b. (1 Rol. Abr. 301.) Vid. sect. 355. 575. Vid. Pl. Com. in Colthirst's case. Doct. & Stud. cap. 20. fol. 93, 94. 8 R. 2. in Waste, in liv. escript. 45 E. 3. 14. 15. 11 H. 4. 39. 14 H. 4. 31. (Ante, 10 a.)

LITTLETON. [Sect. 576. 318 b.] (377)*

On lessor ousting his lessee for years, or dispossessing his lessee for life, and making a feoffment in fee, the lessee's regress was a good attornment

(23) *car*, not in L. and M. nor Roh.

(24) *de le fait*, not in L. and M. nor Roh.

(25) *reteigner*—receiver, L. and M. and

Roh.

(26) *et pur ceo*, added in L. and M. and

Roh.

(27) *et sure chose*, not in L. and M. nor

Roh.

(28) *a luy*, not in L. and M. nor Roh.

(29) *ou atturment*, not in L. & M. nor

Roh.

in law, to vest
the reversion
in the feoffee.

And inasmuch as by such feoffment the tenant for years was (30) put out of his possession, and by his entry he caused the reversion to be to him to whom the feoffment was made, this is a good attornment; for he to whom the feoffment was made, had no reversion before the tenant for years had entered upon him, for that he was (31) in possession in his demesne as of fee, and by the entry of the tenant for years, he hath but a reversion, which is by the act of the tenant for years, scilicet, by his entry, &c.

LITTLETON.
[Sect. 577.
319 a.]

THE same law is, as it seemeth, where a lease is made for life, saving the reversion to the lessor, if the lessor disseise the lessee, and make a feoffment in fee, if the tenant for life enter, and make waste, the feoffee shall have a writ of waste without any other attornment, causâ quâ suprâ, &c.

318 b.
(6 Rep. 69 a.)

There have been now in all seven examples, that Littleton putteth of an attornment in law, and here he putteth two cases also of a notice in law. And the reason of both these is here rendered by Littleton. First for the notice, Littleton saith that the lessee shall not by law be misconusant of the feoffments that were made of and upon the same land. And the reason of the attornment is, because the whole fee simple passeth by the feoffment, and the lessee by his regress leaveth the reversion in the feoffee (v), which *(saith Littleton) is a good attornment. The same law it is of a tenant by statute-merchant or staple, or *elegit*. And so it is of a lease for life, as Littleton here saith; and so it was resolved (f) in Brasbritehe's case, and after in the dean of Paul's his case in the *common place. But shall the lessee in this case whether he will or no do an act that amounts to an attornment, viz. by his regress, or else lose the profit of his land (w)? And some do hold that in that case if the lessee for life do recover in an assise, this is no attornment, because he comes to it by course of law, and not by his voluntary act. And yet in that case, as in the case of the fine, the state of the reversion is in the feoffee. (g) But others do hold it all one in case of a recovery, and a regress.

46 E. 3. 30 b.
2 H. 5. 4. 5 H.
5. 12. 34 H.
6. 6. 18 E. 2.
47. 9 H. 6. 10.

(378)*

(6 Rep. 113 b.)
(f) Bras-
britehe's
case. P. 15
Elliz. Dean
of Paul's
case, 20 Eliz.
(34 H. 6. 7.)

*319 a.

So where he
recovered in
an assise.

(g) 18 E. 3.
48 b. Lib. 6.
fol. 60 b. Sir
Moyle
Finche's
case.

(30) *mis hors de son possession, et per son
entrie il causa le reversion d'estre a celui a que
le feoffment fuit*, not in L. and M. nor Roh.

(31) *en possession—sci re*, L. and M. and
Roh.

(v) The tenant for life or years by his re-entry could not defeat the whole feoffment, because he had only a right to an estate for life or years; and consequently, as his act of entry did not destroy the entire operation of the feoffment, some part of the estate, which passed by the ceremony of this feudal conveyance, must be left in the feoffee. Gilb. Ten. 93. So if the lessee recovered by ejectment or assise, yet he left the fee in the feoffee; since in this case also the entire operation of the feoffment was not destroyed by the recovery, and therefore the fee must reside in him. *Infra*, 319 a.—[Ed.]

(w) In answer to the objection, that by this method a man might be forced to attorn to his enemy, Lord Ch. B. Gilbert observes, that it seemed better, that the tenant should receive some small prejudice, than that the rules of feoffments, upon whose notoriety every man's estate depended, should be broken. And besides it was the tenant's own laches, to suffer himself to be ousted or disseised; and therefore it was to be presumed, that he was satisfied with the feoffee. Gilb. Ten. 93.—[Ed.]

If two joint lessees for years or for life be ousted or disseised by the lessor, and he enfeof another, if one of the lessees re-enter, this is a good attornment, and shall bind both; for an attornment in law is as strong as an attornment in deed. (Post, 297 b. 2 Rep. 67 a.)

If a man make a lease for life, and then grant the reversion for life, and the lessee attorn, and after the lessor disseise the lessee for life, and make a feoffment in fee, and the lessee re-enter, this shall leave a reversion in the grantee for life, and another reversion in the feoffee, and yet this is no attornment in law of the grantee for life, because he doth no act, nor assent to any which might amount to an attornment in law. *Et res inter alios acta alteri nocere non debet.* Neither hath the grantee for life the land in possession, so as he may well be misconusant of the feoffment made upon the land, and so out of the reason of Littleton. But yet the reversion in fee doth pass to the feoffee. (6 Rep. 68. Mo. 98. Post, 266 a.) (2 Rep. 671.)

(h) If the lessor disseise tenant for life, or oust tenant for years, and maketh a feoffment in fee, by this the rent reserved upon the lease for life or years is not extinguished, but *by the regress of the lessee the rent is revived, because it is incident to the reversion: and so hath it been adjudged. But if a man be seised of a rent in fee, and disseise the tenant of the land, and make a feoffment in fee, the tenant re-entereth, this rent is not revived (x). And so note a diversity between a rent incident to a reversion, and a rent not incident to a reversion. Diversity in this case between a rent incident to the reversion, and a rent not incident to the reversion. (A) 9 H. 6. 16. Dean of Paul's case, ubi supra. (Post, 321 b.) (379)* (6 Rep. 70 a.)

*ALSO, if the lord of a rent service grant the services to another, and the tenant attorn by a penny, and after the grantee distrain for the rent behind, and the tenant make rescous; in this case the grantee shall not have an assise for the rent, but a writ of rescous, because the giving of the penny by the tenant was (32) not but by way of attornment, &c. (v). But if the tenant had given to the grantee the said penny as parcel of the rent, or a halfpenny, or a farthing, by way of seisin of the rent, then this *is a good attornment, and also it is a good seisin to the grantee of the rent; and then upon such rescous the grantee shall have an assise, &c.* LITTLETON. [Sect. 565. 314 b.] Diversity between money given by way of attornment, and where it was given by way of seisin of rent. (Post, 159 b. 160 a.) *315 a.

Hereupon is to be observed a diversity between money given by way of attornment, and where it is given as parcel of the rent by 315 a. 39 H. 6. 3. 26. 5 E. 4. 2. Vid.

(32) *ne*, not in L. and M. nor Roh.

(x) Because the feoffor could not have it again, contrary to his own feoffment, and the feoffee could never have it, since he was only seised of the land, and not of the rent, and the rent was never transferred to him. Gilb. Ten. 95.—[Ed.]

(v) And it was not sufficient to found an assise, as it was no seisin of the rent, unless the tenant had given it in the name of seisin; but the grantee might have a writ of rescous, because the distress was lawful, being annexed to the services which passed by the attornment, and therefore the rescue was tortious. Gilb. Ten. 89. A distinction is observable between this case of a rent at law and where a rent is limited under the statute of Uses; for if land be conveyed to A. B. and his heirs, to the use that C. D. may receive thereout an annual rent, the use of the rent is immediately executed by the statute in C. D. 1 Sand. 101.—Ed.]

sect. 535. 25
E. 3. 44. 49 E.
3. 15. 37 H. 6.
39. 49 A. p.
6. 34 H. 6. 42.
15 E. 3. Exe-
cution, 63. 40
E. 3. 22. 28
H. 6. 6 b. 7
H. 4. 2. tit.
Attorney, Br.
97. (6 Rep. 59.)
(Post, 231 a.)
(380) *

LITTLETON.
[Sect. 566.
315 a.]

5. What ten-
ants were
compellable,
or permitted
to attorn.
Attornment
might have
been made by
one of several
joint-tenants;

315 a.
(1) Rol. Abr.
302.
(2) Rep. 67.
(3) 39 H. 6. 3.
28. See
Tooker's
case, ubi su-
pra, and the
authorities
there cited.
(2) Rol. Abr.
424. Post,
297 b.)

or by the te-
nant's he r;
(k) Vid. Lib.
4. fol. 8. Lib. 6.
fol. 57. Lib. 9.
fol. 34. Vid.
4 H. 6. 29.
18 E. 4. 10.
or assignee.

So it might
have been
made by an
infant.
(381) *
(4) 48 E. 3.
Age 33. 26 E.

way of seisin of the rent. For albeit the rent be not due before the day, yet a payment of parcel of the rent beforehand is an actual seisin of the rent to have an assise. And so it is if he give an ox, a horse, a sheep, a knife, or any other valuable thing, in name of seisin of the rent beforehand, this is good. And therefore a payment in name of seisin is more beneficial for the grantee, because that is both an actual seisin and an attornment in law; and yet being given before the day in which the rent is due, it shall not be abated *out of the rent. So as to give seisin of the rent, it is taken for part of the rent; but as to the payment of the rent, it is accounted as no part of the rent; and the reason of the diversity is, for that remedies to come to rights or duties are ever taken favourably. Here also appeareth that there is an actual seisin, or a seisin in deed of a rent, whereof (as Littleton here speaketh) an assise doth lie; and a seisin in law which the grantee hath by attornment before actual possession (1).

ALSO, if there be many joint tenants (33) which hold by certain services, and the lord grant to another the services, and one of the joint tenants attorn to the grantee, this is as good as if all (34) had attorned, for that the seignory is entire, &c.

Here is to be observed what manner of tenants shall attorn to the grant. And first (i) if there be two or more joint-tenants, and one of them attorn, it is sufficient: for, as it hath been often said, there cannot be an attornment in part. And albeit there is great authority against Littleton, yet the law hath been adjudged according to Littleton's opinion (z), as it hath been in other of his cases when they have come in question: and as it is of an attornment, so it is of a seisin; a seisin of a rent by the hands of one joint-tenant is good for all, and a seisin of part of the rent is a good seisin of the whole.

(k) If either the grantor or the grantee die, the attornment is countermanded; but if the tenant die, he that hath his estate may attorn at any time. If the tenant grant over his estate, his assignee may attorn.

(l) If an infant hath lands by purchase or by descent, he shall be compelled to attorn in a *per quæ servitia* (A 1), and no *mischief to the infant; for when he cometh to full age, he may disclaim to hold of him, or he may say that he holds by lesser services: but there

(33) *que—et*, L. and M. and Roh.

(34) *ussent attorne—attornement*, L. and M. and Roh.

(1) This is only to be understood of a rent at common law; but if the rent is limited, as an use under the statute,—as if lands are conveyed by lease and release to A. and his heirs, to the use that B. may receive out of them an annual rent; the statute immediately executes the use of the rent in B.—[Butler, Note 374.]

(z) The attornment of one joint-tenant was good, for both are tenants of the whole land; and since the whole services are due from both, either might consent for the whole. Gilb Ten. 89. Ld. Raym. 312.—[Ed.]

(A 1) As to this writ see n. (z 1) infra.—[Ed.]

should be a greater mischief for the lord if the attornment of an infant should not be good, for he should lose his services in the mean time.

3. 62. 37 H. 8. tit. Attorn. Br. 26 E. 3. 62. 26 Ass. 27. 32 E. 3. tit. per que ser. Conye's case. vit. 6. 2 E. 2. Attorn. 78. 2 E. 2. Ibid. 77. 18 H. 6. 2. Lib. 3. fol. 84, 85. 4 Mar. Dyer, 117. 21 E. 3. Age 55. 7 E. 2. Age 140.

If an infant be a lessee, he shall be compelled to attorn in a *quid juris clamat*. The attornment of an infant to a grant by deed is good, and shall bind him, because it is a lawful act, albeit he be not upon that grant by deed compellable to attorn. Of baron and feme Littleton putteth many cases in this Chapter.

(m) A man that is deaf and dumb, and yet hath understanding, may attorn by signs: (n) but one that is not *compos mentis* cannot attorn, for that he that hath no understanding cannot agree to the grant.

What conveyances shall be good without attornments more shall be said in this Chapter in his proper place.

ALSO, if a man letteth tenements for term of years, by force of which lease (35) the lessee is seised, and after the lessor by his deed grant the reversion to another for term of life, or in tail, or in fee; it behoveth in such case that the tenant for years attorn, or otherwise nothing shall pass to such grantee by such deed. And if in this case the tenant for years attorn to the grantee, then the freehold shall presently pass to the grantee by such attornment, without any livery of seisin, &c. because if any livery of seisin, (36) &c. should be or were needful to be made, then the tenant for years should be, at the time of livery of seisin, ousted of his possession, (37) which should be against reason, &c.

Here Littleton having spoken of grants of seignories and rent-charges, and rent-seck issuing out of land, here treateth of a grant of a reversion of land upon an estate for years; seeing this grant of the reversion must be by deed, and the *agreement of the lessee for years requisite thereunto, the freehold and inheritance do pass thereby, as well as by livery of seisin, if it were in possession: and the grant of the reversion by deed with the attornment of the lessee, do countervail in law a feoffment by livery, as to the passing of the freehold and inheritance.

“For term of years.” (o) And yet a tenant by statute merchant, or tenant by statute-staple, or by *elegit*, must also attorn; for the grantee may have a *venire facias ad computandum*, or tender the money, &c. and discharge the land; and if the reversion be granted by fine, they shall be compelled to attorn in a *quid juris clamat*.

(35) *le lessee*, not in L. and M. nor Roh.

(36) *Uc.* not in L. and M. nor Roh.

(37) *le quel—que*, L. and M. and Roh.

(Ante, 113 a.
181 b.)

And so the executors that have the land until the debts be paid must attorn upon the grant of the reversion, although they have not any certain term for years.

LITTLETON.
[Sect. 568.
315 b.]

or by lessee
for life on a
grant of re-
version ex-
pectant on
his estate;

ALSO, if tenements be letten to a man for term of life, or given in tail, saving the reversion, &c. if he in the reversion in such case grant the reversion to another by his deed, it behoveth that the tenant of the land attorn to the grantee in the life of the grantor, or otherwise the grant is void (38).

315 b.

Here Littleton speaketh of a reversion expectant upon an estate for life, or a gift in tail.

*316 a.

or by tenants
by curtesy
or dower,
though after
assignment;
(p) 10 H. 4.
ut. Attorn. 16.
11 H. 4. 18.
30 E. 3. 16.
38 E. 3. 22.
18 E. 3. 3.
10 E. 3. quid
juris clam.
41. 41 E. 3. 18.
Tempe E. 1.
ut. Wast. 122.

(383)*
(Post, 54 a.)
F. N. B. 55. E.
Regist. f. 72.
4 E. 3. 26.

(2 Rep. 23 b.)

(q) Regist. 72.

"It behoveth that the tenant of the land attorn to the grantee, &c."* Let us therefore speak first of tenant for life: and yet in some case albeit tenant for life hath granted over his estate, yet he shall attorn. (p) As if tenant in dower or by the curtesy grant over his or her estate, and the heir grant over the reversion, the tenant in dower or by the curtesy may attorn, because at the time of the grant made they were attendant to the heir in reversion, and the grantee cannot be tenant in dower, or tenant by the curtesy. And if the reversion be granted by fine, the fine must suppose that the tenant in dower or by the curtesy did hold the land, albeit they had formerly granted over their estate, and albeit the reversion doth pass by the fine; yet the *quid juris clamat* must *be brought against him that was tenant at the time of the note levied. But yet after the reversion is granted over, the grantee shall not have any action of waste against the tenant in dower or by the curtesy, but the action of waste must be brought against their assignee, and not against themselves; for tenant by the curtesy or tenant in dower cannot hold of any but of the heir: and therefore, in respect of the privity, they shall attorn and be subject to an action of waste, as long as the reversion remaineth in the heir, albeit they have granted over their whole estate. And it is worthy of the observation, that if the grantee of the reversion doth bring an action of waste against the assignee of the tenant by the curtesy, (q) the plaintiff must rehearse the statute, which proveth that no prohibition of waste in that case lay at the common law, as it did if the heir had brought it against the tenant by the curtesy itself; and therefore, some do hold, that if the heir do grant over the reversion that the attornment of the assignee of the tenant by the curtesy, or of tenant in dower, is sufficient, because they afterward must be attendant and subject to the action of waste.

18 E. 4. 10 b.
26 E. 3. 62.

If the reversion of lessee for life be granted, and lessee for life assign over his estate, the lessee cannot attorn; but the attornment of the assignee is good, because (as Littleton here saith) it behoveth that the tenant of the land do attorn, and after the assignment there is no tenure or attendance, &c. between the lessee and him in reversion.

(38) &c. added in L. and M. and Roh.

If lessee for life assigneth over his estate upon condition, he, having nothing in him but a condition, shall not attorn; but the assignee may attorn, because he is tenant of the land. 5 H. 6. 10.

IN the same manner is it, if land be (39) granted in tail, or let to a man for term of life (a 1), the remainder to another (40) in fee, if he in the remainder will grant this remainder to another, &c. if the tenant of the land attorn in the life of the grantor then the grant of such a remainder is good, or otherwise not.*

LITTLETON.
[Sect. 569.
316 a.]
or by tenant
for life, &c.
on a grant of
the remainder
expectant on
his estate.
(384)*

Littleton also speaketh here of an attornment by tenant in tail; and true it is that he may attorn; but where the reversion is granted by fine, he is not compellable to attorn, because he hath an estate of inheritance, which may continue for ever (c 1). And so it is of a tenant in tail after possibility of issue extinct, he shall not be compelled to attorn for the inheritance which was once in him.

12 E. 4. 3. 4. 3 E. 4. 11. 43 E. 3. 1. 46 E. 3. 13. (9 Rep. 85 b.) (Ante, 27 b.) 5 H. 6.
(11 Rep. 79.) 20 E. 3. quid juris clamat. 53.

was not compellable to attorn:

(r) But if tenant in tail, after possibility of issue extinct, grant over his estate, his assignee shall be compelled to attorn, because he never had but a bare state for life.

secus as to the assignee of tenant in tail after possibility, &c.
(r) See the Chap. of Tenant in Tail after possibility of issue extinct; and Ewin's case, there cited to be adjudged.

*But as to tenant in tail, note a diversity between a *quid juris clamat*, and a *quem redditum reddit*, or a *per quæ servitia*; for against a tenant in tail no *quid juris clamat* lieth, as is aforesaid. But if a man make a gift in tail, the remainder in fee, and the seignory or rent-charge issuing out of the land be granted by fine, the conusee shall maintain a *per qua servitia*, or a *quem redditum*, and compel him to attorn; for herein his estate of inheritance is no privilege to him, for that a tenant in fee simple (as his estate was at common law,) is also compellable in these cases to attorn.

*316 b.

(41) *P. 12 Edw. 4. It is there holden by the whole court, that tenant in tail shall not be compelled to attorn, but if he will attorn gratis, it is good enough.*

LITTLETON.
[Sect. 570.
316 b.]
(11 Rep. 79.)

(39) *done en taile ou*, not in L. and M. nor Roh.

(41) This paragraph not in L. and M. nor Roh.

(40) *en fee*—&c. L. and M.

(a 1) In the case of tenant for life, remainder in fee, if the remainder-man granted over his remainder, the attornment of the tenant for life, although he held of the very lord, and not of the remainder-man (*supra*, p. 367. n. (n.)) was yet necessary: 1st. Because the remainder-man came in by the feudal feoffment, and therefore the remainder could not pass without the utmost notoriety, and this was by attornment *coram paribus*, to which such notoriety was attributed, that the feudal feoffment could not be altered without it. And 2dly. Because the action of waste, and the right of forfeiture of tenant for life, accrued to him in remainder; and therefore the tenant for life, being to some purposes attendant on the remainder-man, it was fit that he should attorn to his grant. *Gilb. Ten.* 90, 91.—[*Ed.*]

(c 1) And therefore he was looked upon as master of the estate, and was not bound to transfer the reversion according to the pleasure of the grantee. Besides, the statute law is,

(385)*

316 b.
12 E. 4. 3, 4.

*This is added to Littleton, and therefore, though it be good law, and the book truly cited, yet I pass it over.

LITTLETON.
[Sect. 571.
316 b.]

In case of lease for years to one, remainder to another for life, attornment to a grant of the reversion, might have been made by either.

ALSO, if land be let to a man for years, the remainder to another for life, reserving to the lessor a certain rent by the year, and livery of seisin upon this is made to the tenant for years; if he in the reversion in this case grant the reversion to another, (42) &c. and the tenant which is in the remainder after the term of years (43) attorn, this is a good attornment, and he to whom this reversion is granted by force of such attornment shall dis-train the tenant for years for the rent due after such attornment, albeit that the tenant for years did never attorn unto him. And the cause is, for that where the reversion is depending upon an estate of freehold, it sufficeth that the tenant of the freehold do attorn upon such a grant of the reversion, &c.

316 b.

"It sufficeth that the tenant of the freehold do attorn." (1) Note Littleton saith not here, that the tenant of the frank-tenement ought in this case to attorn, but that *it sufficeth that he doth attorn. And I heard Sir James Dyer, chief justice of the common pleas, hold, that in this case if the tenant for years did attorn, it would vest the reversion; for seeing the estate for years is able to support the estate for life, he shall bind him in the remainder by his attornment in respect of his estate and privy.

*317 a.
Pasch. 13 El.
in Bras
bitche's
case, in Com.
Banco.

LITTLETON.
[Sect. 572.
317 a.]
(Ante, 143 a.
150 b. Post,
247 a. 308 a.)
(2 Rol. Abr.
60. 424.)

*And it is to be understood, that where a lease for years, or for life, or a gift in tail, is made to any man, reserving to such lessor or donor a certain rent, &c. if such lessor or donor grant his reversion to another, and the tenant of the land attorn, the rent passeth to the grantee, although that in the deed of the grant of the reversion no mention be made of the rent, for that the rent is incident to the reversion in *such case, and not è converso, &c. For if a man will grant the rent in such case to another, reserving to him the reversion of the land, albeit the tenant attorn to the grantee, this shall be but a rent-seck, &c.*

(386)*

317 a.

Of this Littleton hath spoken before, in the Chapter of Rents.

318 a.

On a grant of a reversion holden of the king without license, te-

And here it is good to be seen what grantors or others that make conveyances, &c. are such as their grants or conveyances are either good without attornment, or where the tenant is no way compellable to attorn. Tenant for life shall not be compelled to attorn in a *quid*

(42) &c. not in L. and M. nor Roh.

(43) *soy*, not in L. and M. nor Roh.

that the will of the donor be observed, and therefore he could not be compelled to transfer the tenure; but if he attorned *gratis*, it was good, because then it could not be presumed to be to the prejudice of his issue. Gilb. Ten. 103.—[Ed.]

(1) Two reasons are given for this. One is, that the possession of the tenant for years is the possession of the immediate freeholder. See *Brediman's case*, 6 Rep. 56 b. The other reason is, that as the termor for years held of the reversioner, and pays the services to him, so the tenant for life holds also of him.—Thus as both hold estates of the reversioner, either of them may attorn. [Butler, note 275.]

juris clamat (E 1) upon a grant of a reversion by fine holden of the king in chief without license; but the reason hereof is, not because the tenant for life might be charged with the fine, for his estate was more ancient than the fine levied, but because the court will not suffer a prejudice to the king, and the king may seize the reversion and rent, and so the tenant shall be attendant to another. Also it is a general rule, that when the grant by fine is defeasible, there the tenant shall not be compelled to attorn.

As if an infant levy a fine, this is defeasible by writ of error during his minority, and therefore the tenant shall not be compelled to attorn.

So if the land be holden in ancient demesne, and he in the reversion levieth a fine of the reversion at the common law, the tenant shall not be compellable to attorn, because the estate that passed is reversible in a writ of deceit.

So if tenant in tail had levied a fine, the tenant should not be compelled to attorn, because it was defeasible by the issue in tail.

But now the statutes of 4 H. 7. and 32 H. 8. having given a further strength to fines to bar the issue in tail, the reason of the common law being taken away, the tenant in this case *shall be compelled to attorn, as it was adjudged (*) in Justice Windham's case.

If an alienation be in mortmain, the tenant shall not be compelled to attorn, because the lord paramount may defeat it.

It is said in our books, that if tenant for life have a privilege not to be impeachable of waste, or any other privilege, if he doth attorn without saving his privilege, that he hath lost it; which is so to be understood, where he attorns in a *quid juris clamat* brought by the conusee of a fine, that if he claimeth not his privilege, but attorn generally, his privilege is lost, for that the writ supposeth him to be but a bare tenant for life; and by his general attornment, according to the writ, he is barred for ever to claim any privilege but a bare estate for life.

But if upon a grant of the reversion by deed, the tenant for life doth attorn, he loseth no privilege, for there can be no conclusion or bar by the attornment *in pais*: and so it is of an attornment in law. As if the lessor disseise the lessee for life, and make a feoffment in fee, and the lessee re-enter; this is an attornment in law, which shall not prejudice him *of any privilege: so it is if the lessor levy a fine of the reversion, and the conusee die without heir, whereby the reversion escheateth, in this case the law doth supply an attornment, and therefore the lessee shall lose no privilege. But in the *quid juris clamat*, if the lessee show his estate and his privilege, and is ready, saving to him his privilege, &c. to attorn, hereby either his

nant for life was not compellable to attorn, in a *quid juris clamat*.
45 E. 3. 6b.
13 Eliz. Dyer. 188.
Lib. 3.
61. 86. Just. Windham's case.
Nor was the tenant compellable to attorn, when a grant by fine was defeasible.
36 H. 6. 24.
(1 Rol. Abr. 297.)

5 E. 3. 25.
31 E. 3. Ancient Demesne 16.

24 E. 3. 25b.
37 H. 6. 33.
48 E. 3. 23.

(387)*

(*) Lib. 3. fol. 86.
Justice Windham's case.
17 E. 3. 7.
22 E. 3. 18.

320 a.

On attornment by the tenant for life in a *quid juris clamat*, without saving his privilege, his privilege was lost. 40 E. 3. 7.
43 E. 3. 5.
48 E. 3. 32.
45 E. 3. 6. 21
E. 3. 48. 24 E. 3. 32. 39 H. 6. 25.
F. N. B. 136 b. (3 Rep. 36. 11 Rep. 79. 1 Rol. Abr. 412. 296. Post, 271 b.)

Secus as to an attornment in deed; or in law;

*320 b.

or where he claimed his privilege in the *quid juris clamat*.

(E 1) See n. (L 1) infra.—[Ed.]

(6 Rep. 39 b.)
(Post. 157 b.)
(s) 43 E. 3. 5.
(6 Rep. 4a.)
(9 Rep. 85 b.)
(388)*
45 E. 3. 11 a.
Vet. N. B. in
per quæ ser-
vitia. 5 E. 3.
Mesne, 56. &
per quæ ser-
vitia 16. 37
H. 6. 33. 39
H. 6. 26. 18
E. 4. 7.
(7 Rep. 4 b.)
Vid. sect. 567.

privilege shall be allowed and entered of record, or he shall not be compelled to attorn (F 1): (s) and if the plaintiff be within age, so as he cannot acknowledge the privilege, the tenant shall not be compelled to attorn until his *full age, when he may acknowledge it. But otherwise it is (as some hold) if a *quid juris clamat* be brought by baron and feme, the privilege shall be entered into the roll, notwithstanding she is a feme covert. And in a *per quæ servitia* brought by the conusee of the mesne, the tenant may show that he held by homage ancestrel, and saving to him his warranty and acquittal, he is ready to attorn. In the same manner, if the tenant hath any other acquittal, and the mesne levy a fine to one for life, the remainder to another in fee, the tenant for life bringeth a *per quæ servitia*, and the tenant is ready to attorn, saving his acquittal, and the plaintiff acknowledgeth it, and thereupon the tenant attorn, tenant for life dieth; in this case, albeit regularly the attornment to the tenant for life is an attornment to him in the remainder, yet in this case he in the remainder shall not distrain, till he hath acknowledged the acquittal, which must be in a *per quæ servitia*, brought by him against the tenant.

LITTLETON.
[Sect. 574.
318 a.]
6. Attorn-
ment, in what
cases unne-
cessary.
Attornment
not requisite
to a release
by one joint-
tenant to his
companion;

ALSO, if two joint-tenants be, who let their land to another for term of life, rendering to them and to their heirs a certain yearly rent; in this case, if one of the joint tenants in the reversion release to the other joint-tenant in the same reversion, this release is good, and he to whom the release is made shall have only the rent of the tenant for life, and shall only have a writ of waste against him, although he never attorned by force of such release (44), &c. And the reason is, for the privity which once was between the tenant for life, and them in the reversion (a 1).

318 a.
2 Eliz. Dyer,
176.
(Ante, 135 a.)

"For the privity, &c." For if one joint-tenant make a lease for years, reserving a rent, and dieth, the survivor shall not have the rent; and therefore Littleton here addeth materially, for the privity that was between the tenant for life and them in the reversion.

(6 Rep. 78. 2
Rol. Abr. 403.
Ant. 193 a.)
(389)*

"Two joint-tenants." And so it is (as it is here to be* understood) albeit there be three or more joint-tenants, and one of them releaseth to one of the other.

(44) &c. not in L. and M. nor Roh.

(F 1) Tenant for life, without impeachment of waste, was not compellable to attorn in the *quid juris clamat*, unless his privilege was allowed; because the fine being a final agreement, with the utmost notoriety, in the king's court, the tenant could have no new privilege, but what appeared of record. So if the grantee sued a *scire facias* against the tenant, and had judgment to execute the fine for any part of the services, it was an attornment for the whole; for the tenant had opportunity to plead in the *scire facias*, why he should not be compelled to attorn. Ante, 314 b. p. 375. Gilb. Ten. 103, 4.—[Ed.]

(a 1) And, as both of them had the reversion, the tenant for life was tenant to them both, and consequently there could be no need of any subsequent consent to create a new tenancy; and payment of the rent, and performance of the services, to one only, was a sufficient notoriety, that the whole fee was in him alone. Gilb. Ten. 92.—[Ed.]

It is true that there is a difference between these releases; for the release in the one case maketh no degree, but he to whom the release is made is supposed in from the first feoffor; and in the other it worketh a degree, and he to whom the release is made is in the *per* by him; yet in neither of these cases there is requisite any attornment, for both of them are within Littleton's reason (for the privity, &c.) (Post, 223.)

IN the same manner, and for the same cause, is it, where a man letteth land to another for life, the remainder to another for life, reserving the reversion to the (45) lessor; in this case, if he in the reversion releaseth to him in the remainder and to his heirs all his right, &c. then he in the remainder hath a fee, &c. and he shall have a writ of waste against the tenant for life without any attornment of him, &c. (H 1).

LITTLETON.
[Sect. 575.
318 b.]
or by the reversioner to him in remainder for life; (1 Rol. Abr. 304.)

This needeth no explanation.

318 b.
Vid. sect. 549.
553. 556.

ALSO, if a lease be made for life, the remainder to another in tail, the remainder over to the right heirs of the tenant for life; in this case, if the tenant for life grant his remainder in fee to another by his deed, this remainder maintenance passeth by the deed without any attornment, (46) &c. for that if any ought to attorn in this case, it should be the tenant for life, and in vain it were that he should attorn upon his own grant, &c.

LITTLETON.
[Sect. 578.
319 b.]
or where tenant for life, being entitled to a mediate remainder limited to his own right heirs, granted it over in fee.

Here it appeareth, that where the ancestor taketh an estate of freehold, and after a remainder is limited to his right heirs, that the fee-simple vesteth in himself, as well as if it had been limited to him and his heirs; for his right heirs *are in this case words of limitation of estate, and not of purchase (1). Otherwise it is where the ancestor taketh but an estate for years; as if a lease for years be made to A., the remainder to B. in tail, the remainder to the right heirs of A., there the remainder vesteth not in A., but the right heirs shall take by purchase, if A. die during the estate tail (κ 1); (Ante, 54 b.)

399 b.
(Ante 13 b. 1
Rol. Abr. 127.)
(390)*
(1 Rep. 669.)

(45) *lessor*—*Juy*, L. and M. and Roh.

(46) *&c.* not in L. and M. nor Roh.

(H 1) Lord Ch. B. Gilbert observes upon this section, that there needed no notoriety to the first tenant for life, because he had already assented to the limitation of the remainder, in the original creation of the feud; and therefore there was no danger that he should be subjected to his enemy, and there was sufficient notoriety to all strangers by his holding of him in the remainder. Ten. 92.—[Ed.]

(1) See ant. 23 b. 140—143. 2 Atk. 57. 247. 1 Ves. 175. 177. Dougl. 506 n. 1. Fearn. Cont. Rem. 4th edit. 30. 102.—[Ed.]

(κ 1) Acc. 1 Co. 104 a. Fearn. Cont. Rem. 65. 4th edit. 482. The reason of the difference, says Ld. Ch. B. Gilbert, is, that in the first case the tenant for life is tenant to the lord, being properly *feoffatus* within the statute of *Quia emptores*. And therefore when a remainder is afterwards limited to the right heirs of tenant for life, such tenant shall be in the homage of his lord, because he has an inheritance for which he ought to avow to venture his life, and the lord shall have the fruits of such feudal inheritance; for if the intermediate estate be extinct, during the minority of the heir, the lord shall have the ward and marriage of him, and shall have the heriot of such tenant dying seised. Hal. Fitzh. 143. And by consequence the inheritance must be supposed to reside in the tenant for life. But

(1 Rol. Abr.
627.)

for, as the ancestor and the heir are *correlativa* of inheritances, so are the testator and executor, or the intestate and administrator of chattels. And so it is if A. make a feoffment in fee to the use of B. for life, and after to the use of C. for life or in tail, and after to the use of the right heirs of B., B. hath the fee-simple in him as well when it is by way of limitation of use, as when it is by act executed.

LITTLETON.
[Sect. 579.
319 b.]

7. What a grantee by fine might do before attornment. Might take things seizable without action, but could neither distrain, nor maintain actions requiring privacy.

*320 a.
(391)*

ALSO, if there be lord and tenant, and the tenant holdeth of the lord by certain rent, and knight service, if the lord grant the services of his tenant by fine, the services are presently in the grantee by force of the fine; but yet the lord (A) may not distrain for any parcel of the services, without attornment: but if the tenant dieth, his heir within age, the lord shall have the wardship of the body of the heir, and of his lands, &c. albeit he never attorned, because that the seignory was in the grantee presently by force of the fine. And also in such case, if the tenant die without heir, the lord shall have the tenancy by way of escheat.*

*Here Littleton beginneth to show what advantages the conusee of a fine may take before attornment, and what not.

(O) 8 E. 3. 44.
26 E. 3. 63.
10 H. 6. 16.
34 H. 6. 7. 12
E. 4. 4. 40 E.
3. 7. 5 H. 5. 12.
48 E. 3. 15 b.
3 E. 2. Droit,
33. (F. N. B.
60. Sect. 564.
4 Inst. 209,
210.)

(t) First, he cannot distrain (* κ 1), because an avowry is in lieu of an action; and thereupon privacy is requisite. So likewise, and for the same cause, he can have no action of waste, nor writ of entry *ad communem legem*, or *in consimili casu*, or *in casu proviso*, writ of customs and services, nor writ of ward, &c. (L 1).

in the second case the tenant for years is not the *feoffatus*; for the proper person to take by the feoffment is the freeholder, and tenant for years is but the bailiff to the freeholder; and it is the freeholder who is attendant to the superior lord, who may be in his homage and holds of him, and from whom the services are due. Therefore this remainder to the right heirs, is not immediately vested in the tenant for years, because the heir is the first that can have the freehold, as feudal tenant to the lord; and therefore, by the words of the grant, he must be the first purchaser of such freehold; and because the tenant for years cannot hold of the lord, or the lord avow upon him, no other interpretation can be made. Gilb. Ten. 96, 97.—[Ed.]

(A) i. e. *the grantee of the services. For as Littleton says, "the seignory was in the grantee presently by force of the fine;" and consequently the grantee of the services is supposed to have become lord by virtue of the grant. (Note from the 18th London Edition, 1823.)*

(* κ 1) That is, at common law, before the 4 & 5 Ann. c. 16. Supra, p. 357, 358. n. (b).—[Ed.]

(L 1) Where the conveyance was by fine, the estate passed before attornment, and the grantee was entitled to every thing which was in possession; but the right of action could not be transferred by the fine, because that would have encouraged maintenance. Gilb. Ten. 100. These fines being taken in the king's court, it became the justice of the king's court to see them performed; and therefore a *scire facias* issued to execute the fine, and a *quid juris clamat* to the tenant for life; in which he was compellable to attorn, unless he could show that he was submitted to his enemy. Idem. 102, 103. As to the process in a *quid juris clam.* see *Sanders v. Freeman*, Pl. Com. 209, 210, 211. So, where a man granted a seignory by fine, and the tenant would not attorn, the grantee might have a writ of *per quæ servitia*, to compel him. Booth 249. Sheph. T. 254. And if a rent was granted by fine, and the tenant would not attorn, the grantee might have had a *quem redditum reddit* to compel him. But since the statute of Uses, the writs of *quid juris clam.* *per quæ servitia* and *quem redditum reddit*, were no longer necessary where fines were levied to uses; for the statutes executing the use to the possession by the præcipe and concord before the ingrossing

But if a man make a lease for years, and grant the reversion by fine, if the lessee be ousted, and the conusee disseised, the conusee, without attornment, shall maintain an assise; for this writ is maintained against a stranger, where there needeth no privity. And such things as the lord may seise, or enter into without suing any action, there the conusee, before any attornment, may take benefit thereof; as to seise a ward or heriot; or to enter into the lands or tenements of a ward; or escheated to him; or to enter for an alienation of tenant for life or years, or of tenant by statute merchant, staple, or elegit, to his disherison.

Sect. 580, 581, 582.

*IN the same manner it is, if a man grant the reversion of his tenant for life to another by fine, the reversion maintain** LITTLETON. [Sect. 580. 320 a.]
passeth to the grantee by force of the fine, but the grantee shall never have an action of waste without attornment, &c. (392)*

BUT yet if the tenant for life alieneth in fee, the grantee may enter (47), &c. because the reversion was in him by force of the fine, and such alienation was to his disheritance. LITTLETON. [Sect. 582. 320 a.]

Of this sufficient hath been said in the next precedent section.

320 b.

BUT in (48) this case where the lord granteth the services of his tenant by fine, if the tenant die (his heir being of full age) the grantee by the fine shall not have relief, nor shall ever distrain for relief, unless that he (49) hath the attornment of the tenant that dieth: (50) for of such a thing which lieth in distress, whereupon the writ of replevin is sued, &c. a man must and ought to avow the taking good and rightful, &c. and there there ought to be an attornment of the tenant, although the grant of such a thing be by fine; but to have the wardship of the lands or tenements so holden during the non-age of the heir, or to have them by way of escheat, there needs no distress, &c. but an entry into the land by force of the right of the seignory, which the grantee hath by force of the fine, &c. Sic vide diversitatem, &c. (51). LITTLETON. [Sect. 582. 320 a.]

Of this sufficient hath been said in the next precedent section.

320 b.

ALSO, if there be lord, mesne, and tenant, and the mesne grant by fine the services of his tenant to another in fee, and LITTLETON. [Sect. 583. 321 a.]

(47) &c. not in L. and M. nor Roh.

(50) &c. added in L. and M. and Roh.

(48) *cew*, not in L. and M. nor Roh.

(51) &c. added in L. and M. Roh.

(49) *avoit l'attornment, fusoit attournement*, L. and M. and Roh.

of the fine, the grantee could not compel the tenant to attorn, for these writs were always to be brought against the tenants before the ingrossing of the fine; and therefore, his benefit by a *quid juris clamat*, being taken away by the statute, he shall distrain without attornment. Ante, 309 b. p. 361. *Sir Moyle Finch's case*, 6 Co. 68. Booth, 250. Et vid. supra, p. 357, 358. n. (a)—[Ed.]

Secus where he was in by title paramount, either by act of law,

(393)*

*after the grantee die without heir, now the services of the mesnalty shall come and escheat to the lord paramount by way of escheat; (52) and if afterwards the services of the mesnalty be behind, in this case he which was lord paramount may distrain the tenant, notwithstanding that the tenant did *never attorn: and the cause is, for that the mesnalty was in deed in the grantee by force of the (53) said fine, and the lord paramount may avow upon the grantee, because in deed he was his tenant, albeit he shall not be compelled to this, &c. But if the grantor in this case had died without heir in the life of the grantee, then he should be compelled to avow upon the grantee; and also, inasmuch the lord paramount doth not claim the mesnalty by force of the grant made by fine levied by the mesne (54), but by virtue of his seignory paramount, (55) viz. by way of escheat, he shall avow upon the tenant for the services which the mesne had, &c. albeit that the tenant did never attorn.*

321 a.

45 E. 3. 2.
34 H. 6. 7.
37 H. 6. 38.
39 H. 6. 32.
5 H. 7. 18. per curiam.

Here Littleton putteth the case where one that claimeth under a conusee by fine may distrain or maintain any action, albeit there was never any attornment made to the conusee, or to him that hath his estate.

Lib. 6. fol. 68.
Sir Moyle Finche's case.

And here is a diversity between an act in law that giveth one inheritance in lieu of another, and an act in law that conveyeth the estate of the conusee only. Of the former Littleton here putteth an example of the escheat of the mesnalty which drowneth the seignory paramount; and therefore reason would that the lord by this act in law should have as much benefit of the mesnalty escheated, as he had of the seignory that is drowned; and the rather for that the law casteth it upon him, and he hath no remedy to compel the tenant to *attorn. Another reason hereof Littleton here yieldeth, because the lord cometh to the mesnalty by a seignory paramount, and therefore there needeth no attornment. (u) As if lessee for life be of a manor, and he surrender his estate to the lessor, there needeth no attornment of the tenant's, because the lessor is in by a title paramount. But if the conusee dieth, and the law casteth his seignory upon his heir by descent, he shall not be in any better estate than his ancestor was, because he claimeth as heir merely by the conusee.

*321 b.

(u) Temps
E. 2. Attorn.
18. 39 H. 6.
38. per Prius.
(Ante, 104 b.
309 b.)

(5 Rep. 113.)
(394)*

So it is (as hath been said) if the conusee of a fine before *attornment bargaineth and selleth the seignory by deed indented and inrolled, the bargainee shall not distrain, because the bargainor, from whom the seignory moveth, had never actual possession.

Sir Moyle
Finche's
case, ubi su-
pra.

So, and from the same reason, if a reversion be granted by fine, and the conusee before attornment disseise the tenant for life, and make a feoffment in fee, and the lessee re-enter, the feoffee shall not distrain.

(52) *et*, not in L. and M. nor Roh.

(53) *dit*, not in L. and M. nor Roh.

(54) *&c.* added in L. and M. and Roh.

(55) *scilicet*, not in L. and M. nor Roh.

IN the same manner it is, where the reversion of a tenant for life is granted by fine to another in fee, and the grantee afterwards dieth without heir, now the lord hath the reversion by way of escheat; and if after the tenant maketh waste, the lord shall have a writ of waste against him, notwithstanding that he never attorned causâ quâ suprâ. But where a man claimeth by force of the grant made by the fine, (56) scil. as heir or assignee, &c. there he shall not distrain, (57) nor avow, nor have an action of waste, &c. without attornment.

LITTLETON.
[Sect. 584.
321 b.]

321 b.
or partly by
act of law,
and partly by
act of the
party;
(Ante, 104 b.)
(w) 45 E. 32.
34 H. 6. 7.
5 H. 7. 18. per
curiam. 13
H. 4. Avowrie
237. (4 Rep.
64. 1 Rol.
Abr. 293. Ant.
153 a.) Lib. 6.
fol. 68. in Sir
Moyle
Finche's
case. (Mo.
92. 68.) 27 H.
8. cap. 10.
or by the sta-
tute of uses;

Here Littleton expresseth two diversities. First, between an act in law, and the grant of the party. This case is put of an (w) escheat, which is a mere act in law, but so it is when it is partly by act in law, and partly by the act of the party; as if the conusee of a statute merchant extendeth a seignory or rent, he shall distrain without any attornment.

If a man make a lease for life or years, and after levy a fine to A. to the use of B. and his heirs, B. shall distrain and have an action of waste, albeit the conusee never had any attornment, because the reversion is vested in him by force of the statute, and hath no remedy to compel the lessee to attorn (M 1).

And so it is of a bargain and sale by deed indented and *inrolled, but this is by force of a statute since Littleton wrote.

(Ant. 309. 2
Cro. 193. 5
Rep. 113 a.
6 Rep. 68 b.
10 Rep. 45.)
(395)*

Secondly, where he that cometh in by act in law is in the *per*, as the heir of the conusee, who sitteth in his ancestor's seat, *tanquam pars antecessoris de sanguine*; and the lord by escheat, which is a stranger, and cometh in merely in the *post*.

ALSO, in ancient boroughs and cities, where lands and tenements within the same boroughs and cities, are devisable by testament by custom and use, &c. if in such (58) borough or city a man be seised of a rent-service, or of a rent-charge, and deviseth such rent or service to another by his testament and dieth; in this case, he to whom such devise is made, may distrain the tenant for the rent or service arere, although the tenant did never attorn.

LITTLETON.
[Sect. 585.
322 a.]
or in the case
of a devise.
(F. N. B.
121 n.)

Here doth Littleton put a case where a man may have a seignory, rent, reversion, or remainder, merely by the act of the party, and may distrain, and have any action without any attornment, and that is by devise of lands devisable by custom when Littleton wrote, by the last will and testament of the owner.

322 a.
34 H. 6. 6.
5 H. 7. 18.
19 H. 6. 24.
21 H. 6. 38.
F. N. B. 121 n.

(56) &c. added in L. and M. and Roh.

(58) *cas*, added in L. and M. and Roh.

(57) *ne avovera*, not in L. and M. nor Roh. nor in MSS.

LITTLETON.
[Sect. 586.
322 a.]

(6 Rep. 23.)
(6 Rep. 63.)

(1 Rep. 120.
3 Rep. 19.
6 Rep. 16. 81.)
(3 Rep. 94.)
(10 Rep. 46.
87.)
(4 Rep. 66.)

(396)*
*322 b.

*IN the same manner is it, where a man letteth such tenements devisable to another for life, or for years, and deviseth the reversion by his testament to another in fee, or in fee-tail, and dieth, and after the tenant commits waste, he to whom the devise was made shall have a writ of waste, although the tenant doth never attorn. And the reason is, for that the will of the devisor made by his testament shall be performed according to the intent of the devisor; and if the effect of this should lie upon the attornment of the tenant (59) then perchance the tenant would never attorn, and then the will of the devisor should never be performed, (60) &c. and for this the devisee shall distrain, &c. or he shall have an action of waste, &c. without attornment. For if a man deviseth such tenements to *another by his testament, habendum sibi in perpetuum, and dieth, and the *devisee enter, he hath a fee-simple, causâ quâ supra; (61) yet (62) if a deed of feoffment had been (63) made to him by the devisor of the same tenements, habendum sibi in perpetuum, and livery of seisin were made upon this, he should have an estate but for term of his life.*

322 b.
22 E. 3. 16.
34 H. 6. 7.
15 H. 7. 12.
19 H. 8. 4.

"For if a man deviseth such tenements to another, &c." Here Littleton putteth a case where the intent of the testator shall be taken, viz. where a man by devise shall have a fee-simple without these words (heirs); and here Littleton putteth the diversity between a will and a feoffment.

Vide sect. 167.

Now by the statutes of 32 and 34 H. 8. (as hath been said in the Chapter of Burgage) lands, tenements, and hereditaments, are devisable, as by the said acts do appear.

(1 Rol. Abr.
293.) Vide
sect. 167.
Bract. lib. 1.
fol. 11. & fol.
60. Flota,
lib. 2. cap. 15.
Briju. fol. 78.
& fol. 212 b.
(6 Rep. 23.
Ant. 9 b.)

LITTLETON.
[Sect. 587.
322 b.]
8. Of attorn.

Both this and the preſedent case stand upon one and the same reason, which Littleton here yieldeth, viz. because that the will of the devisor expressed by his testament shall be performed according to the intent of the devisor; and it shall not lie in the power of the tenant or lessee to frustrate the will of the devisor by denying his attornment. Here Littleton mentioneth a maxim of the common law, viz. *Quod ultima voluntas testatoris est perimplenda secundum veram intentionem suam*: and *Reipublicæ interest suprema hominum testamenta rata haberi* (N 1).

ALSO, if a man be seised of a manor which is parcel in demesne and parcel in service, and is thereof disseised, but the tenants which hold of the manor do never attorn (64) to the dis-

(59) &c. added in L. and M. and Roh.

(60) &c. not in L. and M. nor Roh.

(61) et, added in L. and M. and Roh.

(62) si—le L. and M. and Roh.

(63) ut ecce—fuit, L. and M.

(64) a le—de le, L. and M. and Roh.

(N 1) With respect to those cases in which attornment was not requisite, it may be further observed, that where the grant was in the personality, there needed no attornment. And therefore in grants of annuities, which charge the person of the grantor only, and not his land, attornment was unnecessary. And in all cases where there was an attornment in law, there needed no attornment in deed. Ante, 312 b. p. 370, 371. Sheph. Touch. 258. —[Ed.]

*seisor; in this case, albeit the disseisor dieth seised, and his heir is in by descent, &c. yet may the disseisee distrain for the rent behind, and have the services, &c. But if the tenants come to the disseisor and say, We become your tenants, &c. or *make to him some other attornment, &c. and after the disseisor dieth seised, then the disseisee cannot distrain for the rent, &c. for that all the manor descendeth to the heir of the disseisor, &c.*

ment to es-
tates by dis-
seisin, &c.

(397)*

Littleton having spoken of estates gained by lawful conveyances, doth now speak of estates gained by wrong; and here putteth a case of a disseisin of a manor, where it appeareth, that the disseisor cannot disseise the lord of the rents or services without *the attornment of the tenants to the disseisor; for seeing an attornment is requisite to a feoffment and other lawful conveyances, *à fortiori*, a disseisor or other wrong-doer shall not gain them without attornment. The like law is of an abator and intruder. But albeit the disseisor hath once gotten the attornment of the tenants and payment of their rents, yet may they refuse afterwards for avoiding of their double charge (o 1).

322 b.

(6 Rep. 69 a.)

*323 a.

And here the attornment of the tenant of a manor to a disseisor of the demesnes shall dispossess the lord of the rents and services parcel of the manor, because both demesnes, rents, and services, make but one entire manor, and the demesnes are the principal: but otherwise it is of rents and services in gross, as in this next section our author teaches us.

6 H. 7. 14.
11 H. 7. 28.
11 H. 4. 14 a.
b. (Cro. Car.
308. Ante,
180.)
Attornment
to a disseisor
by the ten-
ants of a
manor, part
in demesne,
part in ser-
vice, dispos-
sessed the
lord of the
rents and
services.
(1 Rol. Abr.
682.)

BUT if one holdeth of me by rent-service, which is a service in gross (65), and not by reason of my manor, and another that hath no right, (66) claimeth the rent, (67) and receives and taketh the same rent of my tenant by coercion of distress, or by other form, and disseiseth me by such taking of the rent: albeit such disseisor dieth so seised in taking of the rent, yet after his death I may well distrain the tenant for the rent which was*

LITTLETON.
[Sect. 588.
323 a.]
Secus in the
case of rents
in gross;
(Cro. Car. 303.
1 Rol. Abr.
683. F. N. B.
179 k.)
(398)*

(65) *et nient per reason de mon mannor,* (67) *et receive—a receiver, L. and M. and*
not in L. and M. nor Roh. Roh.

(66) *claima—claimant mesme, L. and M.*
and Roh.

(o 1) Where a man was disseised of the demesnes of his manor, the services yet remained in him, because the right to the services, by the feudal contract, was not devested out of him by the wrongful possession of the demesnes of his manor; but as all the feudal services were to be done in support of the manor, the knight-services being the attendances of such tenants in the general defence of the realm, embodied under the lord of the demesnes, who carried provisions to subsist them; and the socage services were the actual ploughing of the demesnes of the lord; therefore if the tenants attorned to a disseisor, it put him into the possession of such services, as accessory and belonging to the demesnes of the manor; and if the disseisor died seised of such demesnes as the principal after attornment, then the disseisee could not distrain for the accessory right of the services: but though the tenants did attorn to the disseisor, yet they might afterwards refuse, to avoid the double charge, since this did not take away the right of the disseisee, either to enter into the demesnes, or distrain for the services; for till the right of possession was gained by a descent, the discontinuée might recontinue which part of the manor he pleased. Gilb. Ten. 105, 106. Watk. Desc. 61. Ld. Raym. 862. Hal. Hist. 107.—[Ed.]

(ANL 189 b.
2 Siderf. 76.)

behind before the (68) decease of the disseisor, and also after his decease. And the cause is, for that such disseisor is not my disseisor but at my election, and will. For albeit he taketh the rent of my tenant, &c. yet I may at all times distrain my tenant for the rent behind (69), so as it is to me, but as if I will suffer the tenant to be so long time behind (70) in payment of the same rent unto, &c.

LITTLETON.
[Sect. 589.
323 a.]
(3 Rep. 77.)

*323 b.

[COKE,
323 b.]
(Post, sect.
641.)

*FOR the payment of my tenant to another to whom he ought not to pay, is no disseisin to me, nor shall oust me of my rent without my will (71) and election, &c. For although I may have an assise against such pignor, yet this is at my election, *whether I will take him as my disseisor or no. So such descents of rents in gross shall not oust the lord of his distress, but at any time he may well distrain for the rent behind, &c. And in this case if after the distress of him which so wrongfully took the rent, I grant by my deed the service to another, and the tenant attorn, this is good enough, and the services by such grant and attornment are presently in the grantee, &c. (This also proveth that the right owner is not out of possession, and that this grant over is a demonstration of his election that he is in possession.) But otherwise it is where the rent is parcel of a manor, and the disseisor dieth seized of the whole manor, as in the case next before is said, &c.*

323 a.
(2 Rep. 37.
9 Rep. 51.
Hob. 222.)

(399)*

(*) Vid. Post,
Sect. 237, 238,
239, 240.
(Cro. Car.
303.)

Here Littleton putteth a diversity between a rent-service parcel of a manor, whereof he had spoken before, and a rent-service in gross. For a man cannot be disseised of a rent-service in gross, rent-charge, or rent-seck, by attornment or payment of the rent to a stranger, but at his election: for *the rule of law is, *Nemo red-ditum alterius invito domino percipere aut possidere potest*; and our author teacheth (*) us what be disseisins of rent-services, rent-charges, and rent-secks, and payment to a stranger is none of them, but at the lord's election, as our author here saith.

24 E. 3. 4.
1 E. 5. 5. See
the authori-
ties there fol-
lowing in the
next para-
graph.

5 E. 4. 1. 23
H. 3. tit. Ass.
420. 24 E. 3.
43. 34. 16
Ass. p. 15.
16 E. 3. Re-
lease 56. 1
E. 5. 5. F.N.
B. 179 E. 15
E. 4. 8. Fle-
ta, lib. 4. c. 12.

"Pignor," i. e. the taker of my rent. But if the disseisee bring an assise against such a pignor, then he doth admit himself out of possession.

"Descents." A descent of a rent in gross bindeth not the right owner but that he may distrain, albeit he admitted himself out of possession, and determined his election, as by bringing of an assise, &c.

If the tenant of the land pay the rent to a stranger which hath no right thereunto, and the right owner release to him, this release is good, because he thereby admitted himself to be out of possession. But if the tenant hath given him any thing in name of attornment, and the right owner had released to him, this release had been void, because an attornment only can be no disseisin of the rent.

(68) *decease*—distress, L. and M. and Roh.
(69) *&c.* added in L. and M. and Roh.

(70) *pur—de*, L. and M. and Roh.
(71) *et—ou sans*, L. and M. and Roh.

*ALSO, if I be seised of a manor, parcel in demesne, and parcel in service, and I give certain acres of the land, parcel of the demesne of the same manor, to *another in tail, yielding to me and to my heirs a certain rent, &c. if in this case I be disseised of the manor, and all the tenants attorn and pay their rents to the disseisor, and also the said tenant in tail pay the rent by me reserved, to the disseisor, and after the disseisor dieth seised, (72) &c. and his heir enter, and is in by descent, yet in this case I may well distrain the tenant in tail, and his heirs, for the rent by me reserved upon the gift, scilicet, as well for the rent being behind before the descent to the heir of the disseisor, as also for the rent which happeneth to be behind after the same descent, notwithstanding such dying seised of the disseisor, &c. And the reason is, for that when a man giveth lands (73) in tail, saving the reversion to himself, and he upon the said gift reserveth to himself* a rent or other services, all the rent and services are incident to the reversion; and when a man hath a reversion he cannot be ousted of his reversion by the act of a stranger, unless that the tenant be ousted of his estate and possession, &c. For as long (74) as the tenant in tail and his heirs continue their possession by force of my gift, so long is the reversion in me and in my heirs; and inasmuch as the rent and services reserved upon such gift be incident and depending upon the reversion, whosoever hath the reversion shall have the same rent and services, &c.*

LITTLETON.
[Sect. 590.
323 b.]
or where the
rents and
services
were incident
to a reversion,
parcel of the manor.
(Dyer, 94.)
*324 a.
(Cro. Car.
303.)

(400)*

(8 Rep. 89.)

**IN the same manner is it, where I let parcel of the demesnes of the manor to another for term of life, or for term of years, rendering to me a certain rent, &c. albeit I be disseised of the manor, &c. and the disseisor die seised, (75) &c. and his heir (76) be in by descent, yet I may distrain for the rent arere ut supra, notwithstanding such descent; for when a man hath made such a gift in tail, or such a lease for life, or for years of parcel of the demesnes of a manor, &c. saving the reversion to such donor or lessor, &c. and after he is disseised of the manor, &c. such reversion after such disseisin is severed from the manor in deed, though it be not severed in right (77). And so thou mayest see (my son) a diversity, where there is a manor parcel in demesne and parcel in services, which services are parcel of the same manor not incident to any reversion, &c. and where they are incident to the reversion, &c.*

LITTLETON.
[Sect. 591.
*324 b.]

Here Littleton putteth a diversity between rents and services parcel of a manor (whereof he had spoken before) and rents and services incident to a reversion parcel of a manor.

324 b.
(Cro. Car. 303.
Eol. Abr.
658. 11 Rep.
47, 48. Flowd.
197 b.)

And the reason of this diversity is, for that as long as the donee in tail, lessee for life, or lessee for years, are in possession, they

(72) &c. not in L. and M. nor Roh.
(73) *a un autre*, added in L. and M. and Roh.
(74) *en ceo cas*, added in L. and M. and Roh.

(75) &c. not in L. and M.
(76) *esteant*, not in L. and M. nor Roh.
(77) &c. added in L. and M. and Roh.

- (401)* preserve the reversion in the donor or lessor (p 1); *and so long as the reversion continue in the donor or lessor, so long do the rents and services, which are incident to the reversion, belong to the donor or lessor. Neither can the donor or lessor be put out of his reversion, unless the donee or lessee be put out of their possession; and if the donee or lessee be put out of their possession, then consequently is the donor or lessor put out of their reversion. But if the donee or lessee make a regress, and regain their estate and possession, thereby do they *ipso facto* revest the reversion in the donor or lessor.

(x) 18 Ass.
p. 2. 38 H. 6.
33. Pl. Com.
Fulmer-
stone's case,
103. Lib. 5.
fol. 11, 12. 26.
19 E. 2.
Briefe, 945.
4 E. 3. Briefe,
713. (Post,
340. 11 Rep.
50 b.)
*325 a.

And here is to be observed, that where a man is seised of a manor, and maketh a gift in tail, or lease for life, &c. of parcel of the demesne of the manor, (x) the reversion is part of the manor, and by the grant of the manor the reversion shall pass with the attornment of the donee or lessee. But if the lord make a gift in tail, or a lease for life, of the whole manor, excepting Black Acre, parcel of the demesnes of the manor, and after he granteth away his manor; Black Acre shall not pass; because, during the estate tail, or lease for *life, it is severed from the manor. And so note a diversity, that a reversion of part may be parcel of a manor in possession, but a part in possession cannot be parcel of the reversion of a manor expectant upon any estate of freehold. But if a man make a lease for years of a manor, excepting Black Acre, and after granteth away the manor, Black Acre shall pass, because the freehold being entire, it remaineth parcel of the manor, and one *præcipe* of the whole manor shall serve. But otherwise it is, in case of the gift in tail or lease for life excepting any part, there must be several writs of *præcipe*, because the freehold is several (q 1).

(p 1) A man could not be disseised of a reversion, while his tenant remained in possession; for though the tenant attorned to some other person, that would not put him out of possession of his reversion, because the right being in him, it could not be transferred to any body else, but by some act of his own; and the payment of the tenant was but a wrongful act, and did not give away his lord's right. So, in the case of the rent-charge, where the tenant of the land paid it to another, this wrongful payment did not divest the owner of his right; it was therefore a payment by the tenant in his own wrong, and it still remained in arrear to the owner. Gilb. Ten. 104.—[Ed.]

(q 1) With respect to the conveyance by grant, it may be further observed, that, though the proper and technical words of a grant are *dedi et concessi*, hath given and granted; yet any other words that show the intention of the parties will have the same effect. Ante, 147 a. vol. 1. p. 459, 460. *Holmes v. Sellers*, 3 Lev. 305. 2 Sand. Uses, 39. Every person who has a present estate or interest in lands, in remainder or reversion, or who has any incorporeal hereditament, such as an advowson, a rent, common, &c. may convey it away by grant. But a bare right or possibility cannot be granted, ante, 214 a. p. 85. *Shep. Touch.* 240; neither can a person grant or charge that which he has not; and therefore, if a man grants a rent-charge out of the manor of Dale, when, in truth, he has nothing in the manor, and afterwards purchases it, he shall hold it discharged from this grant, *Perk. s. 65. Shep. Touch.* 243; unless, perhaps, the grant be by fine executory. *Shep. Touch.* 238.

As to the operation of a grant, it is materially different from that of a feoffment, for, we have seen, a feoffment operates immediately on the possession, without any regard to the estate or interest of the feoffor, ante, p. 354. n. (s 1): but a grant only operates on the estate of the grantor, and will pass no more than what the grantor is by law enabled to convey. This rule probably arose from the circumstance, that a grant being always made by deed; the estate of the grantor might be known by inspection of the deed, and if the

CHAP. XXXVIII.*

SAME SUBJECT.

OF LEASES.

LESSA and lease (A) is (a) derived of the Saxon word *leapum*, or *leasum*, for that the lessee cometh in by lawful means; (b) and *dimittere* is in French *laysser*, to depart with or forego.

(403)*
43 b.

Derivation of the word lease.

(a) Mirror, cap. 2. s. 17. Bract. lib. 2. cap. 26. & lib. 4. fol. 230. Fleta, lib. 3. cap. 12. & lib. 5. cap. 34.

(b) For the word (dimittit) see sect. 530.

estate granted was greater than the estate which the grantor had, it was merely void, and the grant only passed as much as the grantor could really give. 4 Cru. Dig. 113. Gilb. Ten. 122. A grant cannot, in any case, operate as a discontinuance. If, therefore, a tenant in tail, of a rent, advowson, common, or of a remainder or reversion, expectant on an estate of freehold, makes a grant in fee, this is no discontinuance of the estate tail, for nothing passes but during the life of the tenant in tail, which is not unlawful. Post, s. 627. 327 b. 2 Sand. Uses, 41. And it follows, from the same principle, that a grant can in no instance operate as a forfeiture. Post, 251 b.—[Ed.]

(A) A lease is a contract for the possession and profits of lands and tenements on the one side, and a recompense of rent or other income on the other; or else it is a conveyance of lands and tenements to a person for life or years, or at will, in consideration of a return of rent or other recompense. 4 Cru. Dig. 115. 4 Bac. Abr. 1. tit. Leases. 2 Bl. Com. 317. Sheph. Touch. c. 14. Although, as Lord Coke presently observes, the words "demise, lease, and to farm let," are the proper technical expressions to constitute a lease; yet any other words which sufficiently show the intention of the parties, that the one shall divest himself of the possession, and the other come into it for a certain time, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease. 4 Bac. Abr. 160, 161. *Roe, d. Jackson v. Ashburner*, 5 T. R. 163. *Barry v. Nugent*, 5 T. R. 165. n. On the other hand, although the most proper words of leasing are made use of, yet if, upon the whole deed, there appears no such intent, but that it is only preparatory and relative to a future lease, the law will rather do violence to the words, than break through the intent of the parties, by construing that to be a present lease, which was only intended by the parties as an article or agreement for a lease. Idem. Et vid. *Goodtitle, d. Estwick v. Way*, 1 T. R. 735. *Doe v. Clare*, 2 T. R. 739. *Tempest v. Rawling*, 13 East, 18. *Doe, d. Broomfield v. Smith*, 6 East, 530. An instrument containing words of present demise, however, will operate as a lease, if such appears to be the intention of the parties, though it contain a clause for a future lease or leases: as where one "thereby agrees to let and the other agrees to take" land for sixty-one years, at a certain rent for building, and the tenant agreed to lay out 2000*l.* within four years, in building five or more houses; and when five houses were covered in, the landlord agreed to grant a lease or leases (which might be for the more convenient underletting or assignment of the leases); but "this agreement was to be considered binding till one fully prepared could be produced." *Poole v. Bentley*, 12 East, 168. Et vid. *Doe, d. Walker v. Groves*, 15 East, 244. And whether an instrument shall be a lease, or only an agreement for a lease, depends on the intention of the parties, as it is to be collected from the instrument. *Morgan, d. Dowding v. Bissell*, 3 Taunt. 65.

Leases are distinguished into, 1st. Leases of the possession; 2dly. Leases of the reversion; 3dly. Leases by way of reversionary interest. 1st. Leases of the possession, are to confer a present right of present enjoyment, at least by the intention of the parties; but a lease at common law, of lands in possession, passes no estate till entry. In the meantime, the lessee has no term or estate; he has merely an *interesse termini*. Ante, 46 b. vol. 1. p. 630. Post, 270 a. This *interesse termini* may be assigned even without deed, or released, ante, 85 a. vol. 1. p. 318, 319. Plowd. 150; but it cannot be surrendered, nor does it, while executory, admit of enlargement by release. Post, 270 a. Though, at the common law, a lessee had no term until actual entry, a bargainee of the use for years, has an actual estate, on the execution of the bargain and sale; and this is the reason that the estate of a bargainee for years may be enlarged by release, without an actual entry. *Barker v. Keate*, 2 Mod. 249. *Mallorie's case*, 5 Co. 113. Post, Chap. 40. Of Releases.

- 45 b. * (c) Words to make a lease be, demise, grant, to farm, let, betake:
 (404)* and whatsoever word amounteth to a grant, may serve *to make a
 (405)* lease. In the king's case (d) this word *committo* doth amount
 1. Circumstances requisite or incident to a lease. Technical words not necessary.
 (c) Vid. sect. 531. (d) Register, F. N. B. 270e.

For the same reason it may be surrendered. 2dly. Leases of the reversion, are leases granted by a person who has a reversion, and they pass a portion of that reversion as a *vested interest*. They confer a right to the reserved rent and services, and create the relation of landlord and tenant between the first lessee and the second lessee. Such leases of a part of the reversion cannot be granted without deed; nor, at common law, without attornment. 3dly. A reversionary lease, is a lease to commence on a future day, or on an event, and is to operate in the meantime by way of or in the nature of an *interesse termini*. It may be granted with or without deed; and it will be good, though granted without deed, by a person who has merely a reversion or remainder: but when granted without deed, it never can confer a right to the possession, till the possession is *vacant*; nor can it confer a right to the rents or services in the meantime. 2 Prest. Conv. 145, 146, 149.

On a lease for life, as it goes to the seisin as well as to the possession, livery must be made, as on a feoffment; unless it be of a reversion or remainder, or any thing lying in grant; or unless it be created under a power, or by a lease and release, which are equivalent to livery. 2 Prest. Conv. 147. But as a lease for years passes only the right of *possession*, as contradistinguished from the *seisin*, it is completed by the entry of the lessee.

A lease for years (with the exception of leases of *incorporeal hereditaments* which must universally be created by deed, ante, 85 a. vol. 1. p. 318, 319.) is still good by parol, so as it does not exceed three years from the time of making; but if it be for a longer term, or for an estate of freehold, it must be by deed or note in writing, signed according to the statute of frauds. St. 29 Car. 2. c. 3. But a parol agreement to grant a lease, though void by the Statute of Frauds, if not reduced into writing (*Hollis v. Whiteing*, 1 Vern. 151.), will be enforced in equity, where there is a substantial part performance, though on the part of the plaintiff in equity only; and a specific performance will be decreed. *Coleman v. Upcott*, 5 Vin. Abr. 527. pl. 17. *Walker v. Walker*, 2 Atk. 100. So where signed by one party only. *Owen v. Davis*, 1 Ves. 83. Et vid. cases cited in n. (a). *ibid*. *Selton v. Slade*, 7 Ves. 265. But acts merely introductory or ancillary to an agreement, will not be considered as a part performance, although attended with expense. See *Clerk v. Wright*, 1 Atk. 12. *Whitbread v. Brockhurst*, 1 Bro. C. C. 412. *Cole v. White*, 1 Bro. C. C. 409. cited *Whitchurch v. Bevis*, 2 Bro. C. C. 559. *Whaley v. Bugenal*, 6 Bro. P. C. 645. *Cook v. Tomba*, 2 Anstr. 420. *Cooth v. Jackson*, 16 Ves. 12. *Reading v. Wilkes*, 3 Bro. C. C. 400. But if possession be delivered, it will be considered as a part performance, *Butcher v. Stapely*, 1 Vern. 363. *Pyke v. Williams*, 2 Vern. 452. *Lockey v. Locky*, Prec. Ch. 518. *Earl of Aylesford's case*, 2 Stra. 783. *Binsted v. Coleman*, Bunb. 65. *Barrett v. Gomeserra*, Bunb. 94. *Lacon v. Mersens*, 3 Atk. 1. *Wills v. Stradling*, 3 Ves. 378. *Bowers v. Cator*, 4 Ves. 91. *Denton v. Stewart*, 1 Tr. Eq. 175. n. 1; especially if he expend money in building or improving according to the agreement. *Foxcroft v. Lister*, 2 Vern. 456. *Gilb. Eq. Rep.* 4. *Colles P. C.* 108. *Floyd v. Buckland*, 2 Freem. 268. *Mortimer v. Orchard*, 2 Ves. jun. 243. 3 Burr. 1919. Possession, however, must be delivered in part performance; for if the purchaser obtain it wrongfully, it will not avail him. *Cole v. White*, 1 Bro. C. C. 409. And a possession, which can be referred to a title distinct from the agreement, will not take a case out of the statute. Therefore possession by a tenant cannot be deemed a part performance, see *Wills v. Stradling*, 3 Ves. 373. *Smith v. Turner*, Prec. Ch. 561. *Sugd. Vend.* 3d edit. 85. And the acceptance of a trifling earnest, or a bare payment of money on account, though it will make a personal contract good by the statute, is not enough where the contract concerns lands. *Alsopp v. Patten*, 1 Vern. 472. *Seagood v. Meale*, Prec. Ch. 560. *Main v. Milbourn*, 4 Ves. 720. *Cokes v. Trecothick*, 9 Ves. 234. And it seems, that even the payment of a considerable sum will not be a part performance. See *Clinan v. Cooke*, 1 Sch. & Lef. 22. *O'Herliby v. Hedges*, *Ibid*. 123. Et vid. *Butcher v. Butcher*, 9 Ves. 382. 1 Ca. & Opin. 136. *Sugd. Vend.* 91, 92. And it may be further observed, that although an agreement be in part performed, yet the court may not be able to ascertain the terms, and then it seems the case will not be taken out of the statute. See *Symondson v. Tweed*, Prec. Cha. 74. *Gilb. Eq. Rep.* 35. *Forster v. Hale*, 3 Ves. 712, 713. But the mere circumstance of the terms not appearing, or being controverted by the parties, will not of itself deter the court from taking the best

sometime to a grant, as when he saith *commisimus W. de B. officium seneschalsie, &c. quamdiu nobis placuerit*, and by that word also he may make a lease: and (e) therefore *à fortiori* a common person by that word may do the same. (e) 8 H. 6. 34.

And albeit (as hath been said) a lease for years must have a certain beginning and a certain end (b), yet the continuance thereof may be uncertain, for the same may cease and revive again in divers cases (1). As if tenant in tail make a lease for years, reserving xx shillings, and after take a wife, and die without issue, now, as to him in the reversion, the lease is merely void; but if he endow the wife of tenant in tail of the land, (as she may be though the estate tail be determined),* now is the lease, as to the tenant in dower (who is in of the state of her husband) (f), revived again as against her, for as to her the estate tail continueth, for she shall be attendant for the third part of the rent services, and yet they were extinct by act in law. So it is if tenant in tail make a lease for years *ut supra*, and dieth without issue, his wife enseint with a son, he in the reversion enter, against him the lease is void, but after the son be born the lease is good, if it be made according to the (g) statute, and otherwise is voidable. 46 a. It must have a certain beginning and end. But, in particular cases, it may cease and revive again in several persons. (7 Co. 9 a. 1 Rol. Abr. 942) (406)* (f) 10 E. 3. 28. 34 Ass. 15. 23 E. 3. Dower, 130. (7 Co. 8 b.) (g) 32 H. 8. cap. 28.

(1) "Vid. 7 Rep. the *Earl of Bedford's case*." Hal. MSS.—Hargr. n. 6. 46 a.

measures to ascertain the real terms. See *Mortimer v. Orchard*, supra. *Anon.* 5 Vin. Abr. 523. pl. 40. *Anon.* Ibid. 522. pl. 38. *Anon.* 6 Ves. 470. *Aston v. Bower*, 3 Bro. C. C. 149. *Clinan v. Cooke*, supra. *Boardman v. Mostyn*, 6 Ves. 467. Sugd. Vend. 93—97. It is also observable, that where a parol agreement is so far executed as to entitle either of the parties to require a specific execution of it, it will be binding on the representatives of the other party, in case of his death, to the same extent as he himself was bound by it. Ibid. Et vid. *Shannon v. Bradstreet*, 1 Sch. & Lef. 52. Note also, that a license to be exercised upon land for twenty-one years, is grantable without deed, and without writing. *Taylor v. Waters*, 7 Taunt. 374.

With respect to the reservation of rent in leases for lives or years, it may be observed, that, as the rent will follow the reversion, the best way is to reserve it generally, as "yielding and paying therefore yearly, during the said term, the sum, &c." Gilb. Rents, 64. 2 Prest. Conv. 184, 185. And a covenant should be inserted for payment of the rent; as the lease, if once assigned, might be afterwards assigned to a beggar. *Pitcher v. Tovey*, Salk. 81. S. C. 4 Mod. 71. *Taylor v. Shun*, 1 Bos. & P. 21. A proviso for re-entry on non-payment of rent, should also be inserted, to bring the lessor within the protection of the stat. 4 Geo. 2. c. 28. And as a lessee may assign his whole interest, or underlet for a part of his term; if it be intended that the lessee shall not do so, an express covenant should be inserted to restrain him. But under an agreement for a lease with usual covenants, the lessor is not entitled to a covenant against assigning or underletting without license. *Henderson v. Hay*, 3 Bro. C. C. 632. *Jones v. Jones*, 12 Ves. 186. *Vere v. Loveden*, Ibid. 179. *Church v. Brown*, 15 Ves. 258. *Broune v. Raban*, 15 Ves. 530. On the other hand, a lessor is not obliged to renew the lease (unless by custom); and therefore if it be intended that the lessor shall be compelled to do so, a covenant for that purpose should be inserted. But if the lessor covenant to renew under "the like covenants," it will not, it seems, extend to a further covenant for renewal. *Tritton v. Foote*, 2 Bro. C. C. 636. *Iggulden v. May*, 9 Ves. 325. S. C. 7 East, 237. *Dowling v. Mill*, 1 Mad. Ch. 541. And, as a lessee for years is compellable to repair, if it be not intended that he should do so, a covenant from the lessor to repair should be also inserted. Watk. Conv. 105.—[Ed.]

(b) As to the doctrine, that a lease must have a certain beginning and a certain end, see ante, 45 b. vol. I. p. 362, 363. and the notes there; 2 Prest. Conv. 158. 181.; and infra, n. (f).—[Ed.]

(1 Rol. Abr. 842.)
(h) Pasch. 2 & 3 Ph. & Mar. in an information of intrusion in the Exchequer against Austen. Vid. Dyer. Pasch. 2 & 3 Ph. & Mar. 115. 13 Eliz. cap. 10.

The king made a gift in tail of the manor of Eastfarleigh, in Kent, to W. to hold by knight's service; W. made a lease to A. for thirty-six years, reserving thirteen pound rent; W. died, his son and heir of full age. All this was found by office. As to the king, this lease is not of force, for he shall have his *primer seisin*, as of lands in possession, but, after livery, the lessee may enter; and if the issue in tail accept the rent, the lease shall bind him, for the king's *primer seisin* shall not take away the election of the issue in tail, for it may be that the rent was better than the land: (h) and so it was adjudged in Austen's case, as I had it of the report of master Edmond Plowden, a grave and learned apprentice of law.

(i) 6 E. 6. Dyer, 72.
(C. Car. 552.) 17 E. 3. 52. 17 Ass. p. 17. 2 R. 3. 20. 9 H. 6. 33. (Hob. 7.) *

If tenant in fee take wife, and make a lease for years, and dieth, the wife is endowed, she shall avoid the lease, but after her decease the lease shall be in force again. But if the patron grant the next avoidance, and after parson, patron, and ordinary, before the statute, (i) had made a lease of the glebe for years, and after the parson dieth, and the grantee of the next avoidance had presented a clerk to the church, who is admitted, instituted, and inducted, and dieth within the term; the patron presents a new clerk, and he is admitted, instituted, and inducted, albeit he cometh in under the patron that was party to the lease, yet because the last incumbent, who had the whole state in him, avoided the lease, it shall not revive again, no more than if a feme covert levy a fine alone, if the husband enter and avoid the fine, and die, the whole estate is so avoided, as it shall not bind the wife after his death (2).

(Hob. 225. 10 Co. 42.)

(407)*
*46 b.
2 E. 3. 8. per Scroope. (1 Rol. Abr. 240, 241.)

*If a woman be endowed of an advowson which is appropriated, and she present, and her incumbent is admitted, instituted, and inducted, albeit the incumbent die, yet is the appropriation wholly dissolved, because the incumbent, which came in by presentation, had the whole state in him (c); and so it was adjudged, as the case is to be intended (3).

Pl. Com. 437 a.
(1 Rol. Abr. 831, 842, 843. 1 Sid. 260, 261.)

Tenant in tail make a lease for forty years, reserving a rent, to commence ten years after; tenant in tail die; the issue enter, and enfeof A. ten years expire, the lessee enter: if A. accept the rent, the lease is good, for he shall have the same election, that the issue in tail had, either to make it good, or to avoid it, so as it could not be precisely affirmed, whether by the entry of the issue this executory lease was avoided, but it dependeth uncertainly upon the will of the feoffee (4). But now I know you are desirous to hear Littleton, who is speaking to you.

(2) "Adjudged accordingly, Cr. Ch. *Plowden v. Oldford*, 582. But in Hill. 10 Eliz. C. B. E. 238. adjudged that the lease revived. *Polydore Virgil's case*.—Hal. MSS.—[Hargr. n. 7. 46 a.]

(3) "Vid. 21 E. 3. Grants, 58. Appropriation without license, and *ea de causa* it seems a disappropriation." Hal. MSS.—[Hargr. n. 1. 46 b. (275).]

(4) "But if it was lease in *presenti* by tenant in tail, and the issue before entry levies fines, the conusee shall not avoid the lease, for the lease was only voidable, and the land passes in degree of reversion. Vid. Dy. 51. 7 Rep. 9. *Earl of Bedford's case*. Hal. MSS.—[Hargr. n. 2. 46 b. (378).]

(c) And the fee, being once discharged, cannot be charged again without a new grant. Hawk. Abr. 71. Ante, vol. 1. p. 224. n. (m)—[Ed.]

Touching the time of the beginning of a lease for years, it is to be observed, that if a lease be made by indenture, bearing date 26 Maii, &c. to have and to hold for twenty-one years, from the date, or from the day of the date (5), it shall begin on the twenty-seventh day of May (6).

*If the lease bear date the twenty-sixth day of May, &c. to have and to hold from the making hereof, or from henceforth, it shall begin on the day on which it is delivered; for the words of the indenture are not of any effect till the delivery, and thereby from the making, or from henceforth, take their first effect. But if it be a *die confectionis*, then it shall begin on the next day after the delivery (D).

If the *habendum* be for the term of twenty-one years, without mentioning when it shall begin, it shall begin from the delivery, for there the words take effect, as is aforesaid.

(5) "Vid. for date and day of the date *hic* fol. 6 a. and the note there." Hal. MSS.—In fol. 6 a. Lord Hale gives the following note:—"Date and day of the date the same in point of computation. 5 Rep. But in point of interest date is taken *inclusive*, day of the date *exclusive* in many cases. T. 9 Jac. B. R. Bulstr. n. 177. A. on the second of August, 1 Jam. makes an obligation to B. and afterwards on the same day B. releases all actions *usque datum scripti*: the obligation is discharged, because date is delivery. Otherwise, if it had been to the day of the date. T. 9. Car. B. R. Rooke and Richards. Condition of obligation to stand to an award, so that it be made within four days after the date; a good award may be made the same day; and so it seems if it be day of the date. M. 1653. Street's case. Stiles 382. Obligation dated 2 January; release dated 1 January, of actions *usque diem hujus præsentis temporis*, but delivered 3 January: *præsens tempus* is the date, and so the obligation stood. P. 7 Jac." Hal. MSS.—See further as to the difference be-

tween date and day of the date, Com. Dig. Estates, G. 8. Bargain and Sale, B. 8. Temps, A. and Vin. Abr. Estates, Z. a Time, A. and Wils. vol. 1. part 2. page 165, and the next note.—[Hargr. n. 8. 46 b. (281).]

(6) "Vid. for commencement of lease, M. 10 Jac. Rot. 75. Hob. case, 32. Moor and Musgrave. A. by indenture dated 4 May 10 Jac. to hold from the feast of the annunciation last past, for the term of 21 years next ensuing the date hereof fully to be complete and ended. In ejectment plaintiff counts on this lease, as a lease to hold from the feast for 21 years *ex tunc prox. sequent.* and agreed to be good. But see T. 24 Car. B. R. Cornish and Cawsey. Lease by indenture of 25 March 15 Car. to have and to hold from and after the day of the date of these presents for the term and time of seven years from henceforth next immediately ensuing, shall commence in computation from the delivery, and in point of interest from the date." Stiles, 118. Hal. MSS.—[Hargrave, n. 9. 46 b. (282).]

At what time it shall commence, where the demise is, to hold, from the date, or day of the date.
5 Co. 1. Clayton's case.
12 Eliz. Dyer, 255. (2 Rol. Abr. 520. Cro. Jac. 135. Post, 257 a.) 14 El. Dy. 307. 5 El. Dy. 218. (1 Rol. Abr. 849, 850. Cr. Ca. 78.) (408)*
Lease to hold, from the making hereof, or from henceforth, begins from the delivery. So where no time of commencement is mentioned;

(D) This distinction between a lease "from the day of making," and one "from the making thereof," has been denied; and it has been held, that the word "from" may, in the strictest propriety of language, be taken either inclusive or exclusive: and where the lease can only be supported by construing the word "from" inclusive (as in the case of a lease under a power to grant leases in possession, but not in reversion), a court of justice ought to give it that sense. *Freeman v. West*, 2 Wils. 165. *Pugh v. Duke of Leeds*, Cowp. 714. So also a lease for lives, to commence "from the date," shall be construed to include the day of the date; for otherwise the freehold would be conveyed to commence *in futuro*, which cannot be. *Hatter v. Ash*, 1 Ld. Raym. 4th edit. 84. And see the authorities there cited by the learned editor, who observes, that the words "from the date," when used to pass an interest, include the day; *aliter* when used by way of computation in matters of account. See also Powell. Pow. 504—510. *Bellasis v. Hester*, 1 Ld. Raym. 280. *The King v. Adlerley*, 2 Dougl. 465. Supra. n. (5) and n. (6).—[Ed.]

or when it bears a void or impossible date;
2 Co. 3. Goddard's case.
or when it refers to a void lease, or misrecites a subsisting lease, to hold from the ending of the former lease.

(k) Pl. Com. 148. 3 E. 6. tit. Leases. Br. 62. 3 El.

Dyer, 195. 1 Mar. Dyer, 116. (Cro. Car. 400. 2 Rol. Abr. 52. 1 Rol. Abr. 849. 1 Sid. 460.)
(409)*

If an indenture of lease bear date which is void or impossible, as the thirtieth day of February, or the fortieth of March, if in this case the term be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all (E).

(k) And so it is, if a man by indenture of lease, either recite* a lease which is not, or is void, or misrecite a lease in point material which is *in esse*, to have and to hold from the ending of the former lease, this lease shall begin in course of time from the delivery thereof (7) (F).

(7) "For misrecital a lease shall commence immediately. 6 Rep. *Bishop of Bath's case*. The Earl of Oxford by deed, dated 10 Feb. 27 H. 8. demises to A. for 21 years; and afterwards by indenture reciting that he by indenture, dated 10 Feb. 28 H. 8. had demised to A. for 21 years, demises the same land to B. *habendum* for 31 years from and after the expiration, surrender, or forfeiture of the *said* lease. It was ruled, that B.'s lease should commence in computation immediately, because A.'s lease was misrecited. H. 10 Car. B. R. Crook, n. 8, *Miller and Manwaringe*. But if in case of such a mis-

recital, the *habendum* be from and after the demise and indenture made to A. and it is not said the *said* demise, then the second lease shall commence after the true lease, notwithstanding the misrecital. M. 1 & 2 P. & M. Rot. 648. *Mount and Hodgken*, Bendl. n. 71." Hal. MSS.—See Cro. Cha. 397, and N. Bendl. 38. See further as to the commencement of leases and the effect of misrecitals in that respect, Sheph. Touch. 272. New Abr. Leases, L. and Vin. Abr. Estate, Z. a. and Grant, R. 4.—[Hargrave, n. 10. 46 b. (283).]

(E) But there is a difference, in this respect, between a lease which bears an impossible date, and one which has an *uncertain* date; for where the time when a lease is to commence is uncertain, as where a lease was made *habendum* from the 20th of November, without saying what November, the uncertainty will render the lease void, because it was part of the agreement, that the lease should commence from the 20th of some November or other; but it not appearing to the court what November was intended, they cannot determine it for the parties, and therefore the lease is void. *Anon.* 1 Mod. 180. 4 Bac. Abr. 168. tit. Leases (L).—[Ed.]

(F) It may be further observed, that in every lease for years there are four times to be considered: 1st, The time of computation; 2dly, The time of commencement in interest; 3dly, The time of continuance; and 4thly, The time of determination in point of limitation. The time of *computation* marks the period or event from which the calculation of the time of continuance is to be taken, to ascertain the time of the determination of the estate in point of limitation; which is a consequence of the time of continuance. The time of *commencement* marks the period at which the owner of the term is to have the enjoyment of the land under the lease or limitation. The time of computation and the time of commencement may be different. 4 Bac. Abr. 170. tit. Leases (L). *Enys v. Donnithorne*, 2 Burr. 1192. The computation of time may be from a day that is past, while the time of commencement is from a day to come: or they may be from the same period: as a lease to hold for twenty-one years, from next Lady Day thenceforth for the term of twenty-one years. With respect to the time of computation it may be either, 1st, from a day past; 2dly, the present time; 3dly, a day to come; 4thly, an event which is to arise; and 5thly, it may be referred to a third person to name the time. 4 Bac. Abr. 176—183. tit. Leases (L). But with regard to the time of commencement, no estate can entitle the person to whom it is made, for time which is past. It is true, that it frequently happens that the person to whom an estate is made, is, by the express agreement of the parties, to have the rent from a day that is past; and it may be said, that rent is not due till the day of payment; and to what becomes due on that day, the owner of the estate in reversion, to which the rent is incident, will be entitled: but no agreement can entitle him, in point of estate, for any period prior to the time when he acquired his estate. Prest. Est. 620, 621. 2 Prest. Conv. 161. The time of commencement in interest may be either, 1st, from the present time; 2dly, a future day in particular; or thirdly, a particular event. The time of

* *TENANT for term of years is where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and the lessee. And when the lessee entereth by force of the lease, then is he tenant for term of years; and if the lessor in such case reserve to him a yearly rent upon such lease, he may choose for to distrain for the rent in the tenements letten, or else he may have an action of debt for the arrearages against the lessee. But in such case it behoveth, that the lessor be seised in the same tenements at the time of his lease; for it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lieth not for the lessee to plead.* (416)*

LITTLETON.
[Sect. 58.
43 b.]

How the reservation of rent is to be made:—
In respect of the things out of which it may be made.

*47 a.

Must be out of lands or tenements, whereon a distress may be had:
(b) 7 Co. 23.
But's case.
10 Co. 55, 60.
(Cro. Ja. 173.
Ante, 142 a.
144 a. 5 Co. 3.
2 Saund. 303.
2 Bol. Abr.
446. 5 Co.
Mountjoy's case.
Noy. 60.)
(m) 30 Ass. p. 5.
12 Ass. 20.
20 H. 4. 10.
1 H. 4. 1, 2, 3.
11 H. 4. 52.
19 E. 2.
Fines, 126.
44 E. 3. 45.
9 Ass. 24.
26 Ass. 60.
14 E. 3.
Scir. fac. 122.

* *"Reserve to him a yearly rent, &c."* First, it appeareth (l) here by Littleton, that a rent must be reserved out of lands or tenements, whereunto the lessor may have resort or recourse to distrain, as Littleton here also saith, and therefore a rent cannot be reserved by a common person (8) out of any incorporeal inheritance, as advowsons, commons, offices, corody, mulcture of a mill, tithes, fairs, markets, liberties, privileges, franchises, and the like. (m) But if the lease be made of them by deed (9) for years, it may be good by way of contract to have an action of debt, but distrain the lessor cannot. Neither shall it pass with the grant of the reversion, for that it is no rent incident to the reversion (10). But if any rent be reserved in such case upon a lease for life, it is utterly void, for that in that case no action of debt doth lie (11).

5 E. 3. 68. 17 E. 3. 75. 11 H. 4. 40. 3 H. 6. 21. 45. 10 H. 6. 12. 21 H. 6. 11. 5 H. 7. 39.
21 H. 7. 19. 17 E. 2. Ex. 112. 23 El. Dyer, 377.

(8) Lord Coke confines the rule to common persons, because the king may reserve rent out of an incorporeal inheritance; the reason of which is, that he by his prerogative can distrain on all the lands of his lessee. 4 New Abr. 192 & 359.—[Hargr. n. 1. 47 a. (284).]

(9) The case of a lease by deed is put, because in general things incorporeal will not pass without deed. Ante, 48 a. (p. 334.), 49 a. (p. 353.), 169 a. (vol. 1. p. 704), and 9 a. (p. 333.).—[Hargr. n. 2. 47 a. (285).]

(10) "12 H. 4. 17. Vid. infra, fol. 44 b.

the case of the precentor of Paul's, according to which rent on lease for years of tithes is incident to the reversion. Hal. MSS. See post, 44 b. n. 30.—[Hargr. n. 3. 47 a. (236).]

(11) That the common law did not allow debt for rent on freehold leases whilst they continued is certain, though the reason is not quite so clear. See 3 Blackst. 233. It has been accounted for by suggesting, that the remedies by *cessavit* and distress were deemed sufficient securities for the rent and services. See Gilb. on Rents, 93. and Gilb. on the Action of Debt in his Case in L. and

computation and the time of determination necessarily mark the time of *continuance*. As to the time of the *end*, this must be certain, or, in other words, the lease must be for a given space which is certain as to the quantity of time which it comprises, as a year, and is to be computed from a particular day, or from a particular event, so that it can be said with certainty on what day, from the day or time of computation, let it happen whensoever it will, that the term will expire by effluxion of time. But so long as the continuance is marked with certainty in the clause of limitation, by an enumeration of years or some other stated period, the continuance of that time may be made uncertain by a collateral determination (as in the case of a lease of the glebe by a parson for twenty-one years, if he shall continue parson so long, ante, 45 b. vol. 1. p. 633.), or by condition. 2 Prest. Conv. 162. And in all modern leases there is a proviso, that if the rent is not paid, and no sufficient distress is found on the premises, the lessor may re-enter and enjoy the lands as in his former estate. See Prest. Est. 615—655. 4 Bac. Abr. tit. Leases (L).—[Ed.]

though rent may be reserved on a demise of the vesture or herbage of land; or on a grant of a reversion or a remainder, &c.

But if a man demiseth the vesture or herbage of his land, he may reserve a rent, for that the thing is manurable, and the lessor may distrain the cattle upon the land (12): and so a reversion, or a remainder of lands or tenements may be granted reserving a rent, for the apparent possibility that it may come in possession (13), and they are tenants within the words of Littleton (a).

In respect of the words by which it may be made.

(n) 40 E. 3. 47. 8 E. 3. 87.

21 E. 4. 62. 3 H. 6. 46. 31 Ass. p. 30. 3 Ass. 9. 26 Ass. 66. 32 E. 3. Br. 291. 6 E. 4. 8. 10 El. Dy. 276. Pl. Com. en Browning & Beeston's case. fol. 131; 132, &c.

(n) It appeareth by Littleton, that *reservando* is an apt word of reserving a rent, and so is *reddendo*, *solvendo*, *faciendo*, *inveniando*, *dummodo*, and the like (14).

Eq. 370. But it may be proper to observe, that the *cessavit* seems to have been first given by the 6 E. 1. c. 4. though the lord's right of seizing the land for subtraction of services, which continued till it was taken away by the 52 H. 3. c. 22. was a remedy in some respects similar, and furnishes occasion for the same observation. See 2 Inst. 295. and Wright's ten. 197. Note, that the 8 Ann. c. 14. now gives debt for rent on a lease for life; on which statute Mr. Serjeant Hawkins queries, whether it doth not extend to leases of incorporeal hereditament. Hawk. Abr. of Co. Lit. 73.—[Hargr. n. 4. 47 a. (287).]

(12) "*Quere*, how assise shall be brought in case of herbage. 17 E. 3. 75." Hal. MSS.—[Hargr. n. 5. 47 a.]

(13) "And after the particular estate determined, distress may be made for all arrears. 10 E. 4. 3." Hal. MSS.—[Hargr. n. 6. 47 a. (288).]

(14) "Lease for years by indenture, and lessee covenants to pay 5*l.* a year; this is a reservation. Dy. 276. H. 6 Car. B. R. Crook, n. 1. *Drake* and *Munday*. But if there be *reddendo* rent, and the lessee covenants to pay two capons, there it seems to be only covenant. M. 40. 41 Eliz. *Bruerton's case*." Hal. MSS.—See Cro. Cha. 207. and Hardr. 326.—Hardr. n. 7. 47 a. (289).]

[So where, by articles of agreement in-

dented between A. and B. it was covenanted and agreed, that A. did let Blackacre to B. for five years from Michaelmas following, provided always, that B. should pay at Michaelmas and Lady-day 10*l.* by even portions yearly; this *proviso* was held to be a good reservation of the rent; for as the words amounted to an immediate demise of the lands, so the rent, which is but a retribution for the land, ought to be paid immediately, and it could not be construed to be a sum in gross, because by the words of the articles (which being indented are the words of both parties) it was to be paid yearly. *Harrington v. Wise*, Cro. Eliz. 486. Moor. 459. But, if a man make a lease of lands, except 12*d.* or præter 12*d.* rent, these words do not amount to a reservation, because they are only proper to reserve to the lessor part of something in being, which would otherwise pass by the lease. Perk. sect. 639. So it is if a man make a lease, *salvo* or saving 20*s.* rent, this is not a good reservation, because there can be no saving of any thing not in being; consequently a rent-service, being a return of something not in the lessor in lieu of the land given, cannot be reserved by words, which, in their most extended signification, can only reserve something already *in case*. 2 Roll. Abr. 449. 6 Bac. Abr. 12. tit. Rents, (D).]—[Ed.]

(g) Although a reversion or remainder be incorporeal, and can pass only by grant, yet a rent reserved upon a grant of them is good; for, though the grantor has no remedy for the rent reserved during the continuance of the particular estate, yet since it relates to lands which were originally granted to make profit of, the judges have gone as far as they could to pursue the intention of such original donations, and therefore have admitted such reservations to be good immediately: which construction is the more reasonable, because in this case there is a remedy by distress for all the arrears, when the reversion executes by the determination of the particular estate, whereas there is no possibility of such remedy in the case of commons, fairs, &c. See Gilb. on Rents, 24. So it is if a man grants a future interest in land, as if it be a lease for years, to commence five years after the making of the lease, the lessor may reserve a rent immediately, because this is a good contract to bind the lessee, and to ground an action of debt; and the lessor may likewise have his remedy by distress for the arrears, when the lessee comes into possession. 2 Rol. Abr. 406, 407. Plowd. 423. See further as to the things out of which a rent may be reserved, ante, 142 a. vol. 1. p. 441.—[Ed.]

(o) And note a diversity between an exception (which is ever of part of the thing granted and of a thing *in esse*) for which *exceptis, salvo, præter*, and the like, be apt words; and a reservation which is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised. *(p)* *Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam retinet semper eum eo est et semper fuit.* *(q)* But out of a general a part may be excepted, as out of a manor, an acre, *ex verbo generali aliquid excipitur*, and not a part of a certainty, as out of twenty acres, one.

Diversity between a reservation and an exception. (o) 50 E. 3. 12. 13 Ass. 9. 38 E. 3. 10. 21 E. 3. 4. 34 Ass. 11. 29 E. 3. 14. 3 H. 6. 45. 10 H. 6. 8. 41. 33 H. 6. 1. 35 H. 6. 34. 17 Ass. 14 H. 8. 1. 44 E. 3. 43. Pl. Com. 361. (p) Bract. lib. 2. fol. 32 b. & fol. 249. (q) 8 E. 4. 48. 26 Ass. pl. 66. (Ante, 47 a.) (e) 35 H. 6. 34.

(q) 9 El. Dy. 264. 38 H. 6. 38. 14 H. 8. 1. 22 E. 3. 8. 2 E. 3. 56. 5 E. 3. 56. 34 Ass. 11.

Reserve cometh of the Latin word *reservo*, that is, to provide for store; as when a man departeth with his land, he reserveth or provideth for himself a rent for his own livelihood. And sometime it hath the force of *saving* or *excepting*. So as *(r)* sometime it serveth to reserve a new thing, viz. a rent, and *(s)* sometime to except part of the thing *in esse* that is granted (15).

It is further to be observed, that the lessor cannot reserve to any other but himself, for Littleton saith, *reserve to himself* (11). *(t)* If two joint-tenants be, and they make a lease for years by parol, or deed poll, reserving a rent to one of them, this shall enure to them both; but if it be so reserved by deed indented, it shall enure to him alone by way of conclusion (1).

Reservation of rent must be made to the lessor and not to a stranger. (13) • Reservation of rent to one joint-tenant, on a joint lease, enures to both: unless by deed indented. (t) 5 E. 4. 4. 14 E. 3. Bre. 282. 8 Co. 70. 17.

(15) In a preceding note Lord Coke asserts, that reservation is *always* of a thing newly created out of the land demised. Ante, 47 a. (supra.) But here he is more qualified in expression, and allows the word to be *sometimes* used to *except* part of the thing granted. However, the former is the more technical use of the word; *exception* being a more proper term than *reservation* for the latter purpose. The learning on this subject will be found under the title *Reservation* in Viner's Abridgment.—Hargr. n. 1. 143 a. (232).]

(11) For the reason of this rule, see ante, 143. vol. 1. p. 442. n. (c.) If, however, a person makes a lease to commence after his death, reserving rent to his heirs; this will be deemed a good rent-service arising in the heir, not by way of purchase, but as incident to the reversion descending to the heir; and, therefore, may be released by the ancestor during his life, which it could not be, if it was a new purchase in the heir. 2 Rol. Abr. 447. pl. 2. 2 Saund. 370. But where a father and his son and heir apparent demised land for years, to begin after the death of the father, rendering rent to the son by his proper name; the father died; the lessee entered; and, the rent being behind, the son distrained: it was resolved, that this reservation of rent was utterly void: for, although the son was heir to the father, yet he could not have the rent as heir to his father, because the rent was not reserved to the heir; and he could not have it by the reservation on the lease, because he was a stranger to the land, and had nothing in it at the time of making the lease. For heir is the only word of privity in law requisite to the reservation of rents; the heir being, in representation in point of taking by inheritance, *eadem persona cum antecessore*. *Oates v. Frith*, Hob. 130. Note, that a man may reserve a rent to himself for his life, and a different rent to his heir. Ante, 213 b. 214 a. p. 82, 83. See further as to the reservation of rents, infra, n. (κ).—[Ed.]

(1) The reason of the difference is this; where the lease is by deed-poll, or parol, the rent shall follow the reversion, which is jointly in both lessors; and the rather, because the rent being something in retribution for the land given, the joint-tenant to whom it is re-

Diversity between a reservation of rent to the lessor, without saying, "and his heirs," and a reservation generally, where the lessor dies during the term.

(u) Vid. sect. 214, 215, 216, &c. 10 E. 4. 18. 11 E. 3. Ass. 96. 27 H. 8. 19. 21 H. 7. 25. 30 H. 8. Dy. 45. (w) Mich. 5. Ja. in repl. inter Wootton & Edwin, Bank le Roy, Hil. 33 El. Rot. 1431. in Bank le Roy, inter Richmond & Butcher.

(Ante, 215 b. 2 Rol. Abr. 450. 12 Co. 35. 2 Rol. Abr. 743.) Vid. for this word Distrin, Sect. 136.

(u) Littleton here is putting of a case, and not making a lease, for then he would not reserve the rent to him, but to him and his heirs, for otherwise the rent shall determine by his death, if he die within term (16). (w) But if he reserve a rent generally without showing to whom it shall go, it shall go to his heirs. If he reserve a rent to him and his assigns, yet the rent shall determine by his death, because the reservation is good but during his life. So it is, if he reserve a rent to him and his executors, it shall end by his death, because the heir hath the reversion, and the rent was incident to the reversion (17). So, if a man warrant land to B. and his assigns, the assignee must vouch during the life of B., for the warranty continues but only during the life of B., for the warranty is but for life, for want of words of inheritance. But if the warranty be to B., his heirs and assigns, so as he hath an inheritance therein, then his assignee shall vouch after his decease. So if the rent be reserved to the lessor, his heirs and assigns, so as it be incident to the inheritance, then shall all the assignees of the reversion enjoy the same (x).

(16) "Rent, reserved to him and his assigns during the term, or to him his executors and assigns during the term, determines by the lessor's death. T. 2 Car. B. R. Noy. n. 412. 12 Co. n. 20. and Hil. 32 Eliz. *Richmond's case*." Hal. MSS.—See Noy. 96. 12 Co. 35. and Cro. Eliz. 217.—But notwithstanding the cases here cited by Lord Hale, it was adjudged, whilst he was chief justice of the king's bench, that the words *during the term* are of themselves sufficient

to carry the rent to the heir, if the lessor is seized in fee, and he concurred in the judgment. See the case of *Sacheverell and Froggatt*, East. 23 Cha. 2. in Saund. 367.—[Hargr. n. 8. 47 a. (290).]

(17) "Rendering rent to him, his heirs, executors, and administrators good, and it shall go to the heir. *Drake's case*, supra. Rendering rent to him or his successors good, and the successor shall have it." 5 Rep. Hal. MSS.—[Hargr. n. 9. 47 a. (291).]

served ought to be seized of it in the same manner as he was of the land demised, which was equally for the benefit of his companion as himself; but where the lease is by deed indented, they are estopped to claim the rent in any other manner than as it is reserved by the deed, because the indenture is the deed of each party; and no man shall be allowed to recede from, or vary his own solemn act. 2 Rol. Abr. 447. Vent. 161. 6 Bac. Abr. 20.—[Ed.]

(x) In *Sacheverell v. Froggatt*, 1 Vent. 161, Lord Hale lays down some useful rules respecting the reservation of the rent. He said, that where the reservation of the rent is general, the law directs according to the intent and the nature of the thing demised: As if tenant in tail makes a lease for years, rendering rent to him and his heirs, the rent shall go to the heir in tail along with the reversion: for the law uses all industry imaginable to conform the reservation to the estate. So where tenant for life, the remainder over to several by limitation of uses, with power to make leases, demises, reserving rent to him, his heirs and assigns, it shall be adjudged to him in remainder. *Whitlock's case*, 8 Co. 70 b. So if lessee for 100 years make a lease for 50 years, rendering rent to him and his heirs during the term, it shall go to the executor. So where a copyholder by license leases, rendering rent to him and his wife during their lives, and to his heirs, where by the custom the wife has her free-bench, the wife shall have the rent as incident to the reversion, though not party to the lease; for the reversion, if possible, will attract the rent to it. So where the words are general, they will be expanded according to law; and therefore if tenant in tail to him and the heirs male of the body of his father, lets the land, rendering rent to him, his heirs and assigns, the rent shall go to the heir male of the body of his father, though he be not heir to the lessor; for it is incident to the reversion. *Cotter v. Merrick*, Hardr. 91. 95. 2 Saund. 371. ed. Wms.

But where the reservation is particular, as to the lessor, without going further, or to the lessor and his assigns, there the rent shall determine with his death, though the lease, upon which it is reserved, be still continuing: for the reservation is good only during his life, and it shall never be carried further than the period of time the lessor himself has fixed it:

*“*Yearly rent.*” So it is, if the rent be reserved every two or three or more years (18). Of rents Littleton doth excellently treat in his Chapter of Rents, and therefore in this place thus much shall suffice.

(414)*
The rent may be reserved every year, or every two or three years.

*“*But in such case it behoveth, that the lessor be seised in the same tenements at the time of his lease; for it is a good plea for the lessee (19) to say, that the lessor had nothing in the tenements at the time of the lease.*” And the reason of this is, for that in every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum*; and therefore if the lessor hath nothing in the land, the lessee hath not *quid pro quo*, nor any thing for which he should pay any rent. And in that case he may also plead, that the lessor *non dimisit*, and give in evidence the other matter (20).

(415)*
47 b.
Where the lessor is not seised of the land, at the time of the demise, the lessee may plead nil habuit in tenementis; or non dimisit, &c.:

“*Except (x) the lease be made by deed indented, &c.*” If the lease be made by deed indented, then are both parties concluded (L);

secus if the lease be by deed indented.
(x) 45 E. 3. 7.

(18) See further as to reservation of rent, Vin. Abr. tit Reservation, and Gilb. Treat. on Rents.—[Hargr. n. 10. 47 a.]

rent it is good without alleging seisin.” 20 E. 3. Barr. 132. 21 H. 7. 39. Hal. MSS.—[Hargr. n. 9 47 b. (306).]

(19) “*Nota*, this diversity. In pleading a lease one ought to say, that the lessor was seised and demised; but in count in debt for

(20) “18 E. 3. 16. Brief, 747. Dy. 122. Martyn and Hardye.” Hal. MSS.—[Hargr. n. 10. 47 b.]

and therefore, in this case, the agreement of the parties prevents the construction of law. Hardr. 91. So where the reservation is special, and to improper persons, there the law follows the words. And therefore if rent is reserved to the lessor, and his executors, he having the freehold, it will determine at his death; because the reversion, to which the rent is incident, descends to the heir. So if a lease be made of a term for years, reserving rent to the lessor and his heirs, such rent will determine by the death of the lessor: for the heir cannot have it, as he could not succeed to the estate, being only a chattel; and the executor cannot have it, there being no words to carry it to him. 1 Ventr. 161. But where a man, seized of land in fee, made a lease for years, reserving rent to him and his assigns during the term, it was adjudged, that this reservation should not determine by the death of the lessor, but the rent should go to this heir; for though there was no mention of the heirs in the reservation, yet there were words which evidently declared the intention of the lessor, that the payment of the rent should be of equal duration with the lease; the lessor having expressly provided, that it should be paid during the term; and consequently the rent must be carried over to the heir, who came into the inheritance after the death of the lessor, and would have succeeded in the possession of the estate, if no lease had been made: and, if the lessor had assigned over his reversion, the assignee should have had the rent as incident to it; because the rent was to continue during the term, and must therefore follow the reversion, since the lessor made no particular disposition of it, separate from the reversion. *Sury v. Brown*, Latch. 99, 100. Ventr. 163. So if a lease be made for years, reserving rent during the term to the lessor his executors administrators and assigns, the rent goes to the heir: because the reservation being to the lessor and his assigns during the term, the words *executors* and *administrators* are void, and, the lessor having the inheritance, such express words evidently discover the intent of the contract, and that the lessee agreed and bound himself to the payment of the rent during the continuance of the demise. *Sucheverell v. Froggall*, 2 Saund. 367. 2 Lev. 13 Raym. 213. Ventr. 161. And for the same reason, if a term for fifty years leases for twenty-five years, reserving rent to him and his heirs during the term, the executors shall have the rent after the death of the lessor. Ventr. 162. Note, that where no reversion is left in the lessor, and the rent is reserved to his executors, administrators, and assigns, it will go to them, and not to the heir. *Jenison v. Lexington*, 1 P. Wms. 555. Et vid. ante, vol. 1. p. 441. n. (B). Where tenant for life and the person in reversion join in a lease for life, or gift in tail, by deed, reserving a rent, this shall enure to the tenant for life only, during his life, and after his death to the person in reversion. Ante, 214 a. p. 81. See further on the subject of this note, 2 Prest. Conv. 184—189.—[Ed.]

(L) Leases by estoppel are such as are made by persons who have no interest at the time,

2 (416)* (y) but if it be by deed poll the lessee is not *estopped to say that

0 E. 4. 10.

31 H. 6. 4d. 35 H. 6. 34. 9 H. 6. 35. 14 H. 4. 22.

2. Lease by estoppel.

(y) 2 E. 2. Estop. 253. 39 E. 3. 13. Pl. Com. 434. 18 E. 3. 16^o. 15 E. 3. Estop. 236.

14 H. 4. 32. (Mo. 20.)

or at least no *vested* estate, but are to operate on their ownership, when they shall acquire the same. Thus, if an *heir apparent*, or a person having a *contingent remainder*, or an interest under an *executory devise*, or who has no title whatever at the time, makes a lease by *indenture*, or by a *fine sur concessit*, and afterwards an estate vests in him, this indenture, or fine, will operate by way of estoppel, to entitle the lessee to hold the lands for the term granted to him; and this estoppel, when it becomes efficient, and can operate on the interest, will be fed by the interest; and the lease will be deemed as a lease derived out of an actual ownership. *Weale and Lower*, Pollexf. 54. 4 Bac. Abr. Leases (O). 2 Prest. Conv. 136. And in such case, where a lease is made by indenture, the lessor and lessee are concluded from avoiding the lease: and if an action be brought, and the plaintiff declare on the indenture, and the defendant plead that the lessor *nil habuit in tenementis*, the plaintiff, instead of replying the estoppel, may demur: because the estoppel appears on the record. *Palmer v. Ekins*, Stra. 118. 11 Mod. 411. Ld. Raym. 1550. S. C. And the law is the same, if the defendant pleads what is tantamount to a plea of *nil habuit in tenementis*: as that the lessor had only an equitable estate in the premises. *Blake v. Foster*, 8 T. R. 487; and see *Palmer v. Ekins*, supra; and n. (m) infra.

It has been determined that the assignee of a reversion may take advantage of an estoppel, because it runs with the land. *Palmer v. Ekins*, supra. So, where covenant was brought on an indenture of lease by the assignees of the lessor (a bankrupt); the defendant pleaded that the lessor *nil habuit in tenementis*; it was held bad, on general demurrer. *Parker v. Manning*, 7 T. R. 537. In like manner it has been adjudged, that an assignee of the lessee, under a lease by indenture, cannot plead that the lessor did not demise. *Taylor v. Needham*, 2 Taunt. 278. The rule, that a tenant shall not be permitted to set up an objection to the title of the landlord, under whom he holds, is not a mere technical rule, but one founded in public convenience and policy. Hence, a lessee of land in the Bedford level cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the stat. 15 Car. 2. c. 17. for want of being registered; such act enacting, that "no lease, &c. should be of force but from the time it should be registered," not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrancers, registering their titles before. *Hodson v. Sharpe*, 10 East, 350. But it seems, that, in order to give a party the benefit of an estoppel, in all cases where it is necessary to set forth a title, a good title must appear on the face of the declaration; for in *Nokes v. Ludor* it was resolved, by all the judges, that although they would not intend a lease to be good by estoppel only, yet where it appeared on the face of the declaration to be so, the assignee of such a lease could not maintain an action for the breach of any of the covenants contained in the lease. Cro. Eliz. 373. 436. So where covenant was brought against a lessee for years, on an indenture of lease, and it appeared on the declaration, that the lease was executed by a tenant for life, that the plaintiff, the reversioner, who was then under age, was named in the lease, but that the lease had not been executed by him until after the death of the tenant for life, judgment was given for the defendant, on the ground that the lease was void by the death of tenant for life; Buller, J. observing, that the court could not proceed on the doctrine of estoppel in this case, because it was admitted by the plaintiff on the pleadings, that he did not execute until after the death of the tenant for life. *Ludford v. Barber*, 1 T. R. 86. So where the plaintiff declared, that by deed made between her, as attorney for I. S., on the one part, and the defendant on the other, she demised a house to the defendant, and that he covenanted to pay the rent to I. S., and then assigned a breach, in the non-payment of the rent, to the damage of the plaintiff (the attorney): on demurrer the court held, that it appearing on the declaration that the lease was void, because it was not made in the name of I. S., whose house it appeared to be (*Wilks v. Beck*, 2 East, 142.), and that the plaintiff only made it as his attorney, there could not be any estoppel; and then the covenant to pay the rent was void, and consequently the plaintiff could not maintain the action. *Frontin v. Small*, Ld. Raym. 1418. S. C. Stra. 705. It should also be observed, that it is a rule, that no lease can operate by way of passing an interest, will operate by way of estoppel. Infra, 45 a. p. 432. 2 Prest. Conv. 137. And where a lease, by indenture, takes effect in point of interest, which interest may be co-extensive with the lease in point of duration, but in fact determines before it, the lease may then be avoided, and the parties are not estopped from showing the facts which determined the lease; as where A. lessee for

the lessor had nothing at the time of the lease made (m). A., lessee for the life of B., makes a lease *for years by deed indented, and after purchases the reversion in fee; B. dieth, A. shall avoid his own lease, for he may confess and avoid the lease which took effect in point of interest, and determined by the death of B. (n). But if A. had nothing in the land, and made a lease for years by deed indented, and after purchase the land, the lessor is as well concluded as the lessee to say, that the lessor had nothing in the land (21); and here it worketh only upon the conclusion, and the lessor cannot confess and avoid, as he might in the other case.

Lease for years by tenant pur autre vie, is void on death cestui que, though the lessor afterwards purchases the reversion.

(417)* Lease for years by one having no interest, but who afterwards purchases the land, is good by estoppel.

chases the land, is good by estoppel.

(21) "*Et videtur*, that by purchase of the tamen, P. 3 Car. C. B. Crook, n. 2. *Isham* land, that is turned into a lease in interest, and *Morris*." Hal. MSS.—See Cro. Cha. which before was purely an estoppel. Vid. 109.—[Hargr. n. 11. 47 b. (307).]

life of B. makes a lease for years by deed indented, and afterwards purchases the reversion in fee; B. dies; A. shall avoid his own lease; for he may confess and avoid the lease which took effect in point of interest, and determined by the death of B. *Infra*, 47 b. *Treport's case*, 6 Co. 15 a. *Brudnell v. Roberts*, 2 Wils. 143. 1 Selw. 498. 4 Bac. Abr. 191. So it seems that, in an action by a lessor for a breach of covenant, on an indenture of lease, in not repairing, &c. the lessee is not estopped from showing that the lessor was only seised in right of his wife for her life, and that she died before the covenant broken; because an interest passed by the lease. *Blake v. Forster*, 8 T. R. 487.—[*Ed.*]

(m) Acc. *Lewis v. Willis*, 1 Wils. 314. Et vid. *Taylor v. Needham*, 2 Taunt. 278. But *nil habuit in tenementis* cannot be pleaded to an action for use and occupation, *Lewis v. Willis*, *supra*; nor can it be given in evidence in this action. *Cooke, Clerk v. Loxley*, 5 T. R. 4. Et vid. *Brooksbey v. Watts*, 1 Marsh. 38. 6 Taunt. 333. Neither will a defendant, who has obtained possession under the plaintiff, be permitted to show that the plaintiff's title has expired, unless he solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person. Proof of payment of rent to a third person claiming title is not sufficient, without a formal renunciation of the plaintiff's title. *Balls v. Westwood*, 2 Camp. 11. But where a tenant by mistake, or misrepresentation, pays rent to a person not entitled to demand it, he will not be precluded by such payment from giving evidence, on a plea of *non tenuit* in replevin against the supposed landlord, to prove that the latter is not entitled to the rent. *Rogers v. Pitcher*, 1 Marsh. 541. And it has been determined, that to an avowry for rent the tenant may plead payment of a ground rent to the original landlord, on the principle that the ground rent was a prior charge on the land; *Sapsford v. Fletcher*, 4 T. R. 511. So he may plead payment of an annuity, secured out of the lands demised previously to the demise to him, for the arrears of which the grantee of the annuity had threatened to distrain; for a payment to a party having a prior charge on the land, and threatening to distrain if that be not satisfied, will be considered as a payment to the immediate landlord. *Taylor v. Zamira*, 2 Marsh. 220. And it seems that, in such case, if the sum paid by the tenant exceeds the rent due to his landlord, it will create an *assumpsit* on the part of the landlord to repay him such excess, as money paid to his use. *Per Burrough*, J. Id. 226.

Note, that the action for use and occupation is given by stat. 11 Geo. 2. c. 19. s. 14, whereby it is enacted, that landlords, where the agreement is not by deed, may recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant, in an action on the case, for the use and occupation of what was so held or enjoyed; and if, in evidence on the trial of such action, any parol demise, or any agreement (not being by deed), whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered. See post, Chap. 54.—[*Ed.*]

(n) In *Gilman v. Hoare*, 1 Salk. 275, Holt, C. J. observed, that the reason of this case was, because tenant for life has a freehold, which is a greater estate, and the lease will not require any estoppel, if the life endure.—[*Ed.*]

So where a man takes a lease of his own land, rendering rent: secus as to a lease of the herbage.

(z) 14 H. 6. 22. 8 H. 4. 7.

a) Resolved Pasch. 2 Eliz. in Communi

Banco. (Cro. Cha. 110.)
(b) Mich. 31 & 32 El. in Communi Banco, adjudged in Lond. case.

(z) If a man take a lease of his own land by deed indented, reserving a rent, the lessee is concluded. (a) But if a man take a lease of the herbage of his own land by deed indented, this is no conclusion to say, that the lessor had nothing in the land, because it was not made of the land itself: (b) but if a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended (22).

(418)*
Estoppel determining by the ending of the term.
(c) 38 H. 6. 24. 30 E. 3. 21.
(Ante, 229 a.)
*48 a.

* For by the making of the lease, the estoppel doth grow, and consequently by the end of the lease, the estoppel determines (23), (c) and that *part of the indenture which belonged to the lessee, doth after the term ended belong to the lessor, which should not be if the estoppel continued (o).

43 b.
3. By whom leases may be made.
*44 a.

(d) 32 H. 8. cap. 23. 1 El. not printed but in the Abridgement. 13 Eliz. cap. 10. 13 Eliz. cap. 6. 1 Jac. cap. 2.

When Littleton wrote, many persons might make leases for years, or for life or *lives, at their will and pleasure, which now cannot make them firm in law. And some persons may now make leases for years, or for life or lives (observing due incidents), firm and good in law, who of themselves could not so do when Littleton wrote, and this by force of divers acts of parliament (d); as namely, 32 H. 8, 1 Eliz. 13 Eliz. and 1 Jac. Regis. of which statutes one is enabling, and the rest are disabling. When Littleton wrote, bishops with the confirmation of the dean and chapter, master and fellows of any college, deans and chapters, master or guardian of any hospital and his brethren, parson or vicar with the consent of the patron and ordinary, archdeacon, prebend, or any other body politic, spiritual, and ecclesiastical (*concurrentibus hiis quæ in jure requiruntur*), might have made leases for lives or years, without limitation or stint. And so might they have made gifts in tail or states in fee at their will and pleasure, whereupon not only great decay of divine service, but dilapidations and other inconveniences, ensued, and therefore they were disabled and restrained by the said acts of 1 Eliz. 13 Eliz. and 1 Jac. Regis, to make any state or conveyance to the king at all, or to the subject; but there is excepted out of the restraint or disability, leases for three lives, or one-and-twenty years, with such reservation of rent, and with such other provisions and

5 Co. 14. case de Ecclesiastical Persons. 11 Co. 66. Magdalen College case. L'Evesque de Sarum's case. 10 Co. 60. 61. (1 Sid. 162.)

(22) "Vid. 4 H. 6. 7. If disseisee makes lease for years by indenture to disseisor, he shall not have assise during this lease." Hal. MSS.—(Hargr. n. 12. 47 b. (308).] (309).]

(23) "30 E. 3. 21. Vid. 14 H. 6. 22.

(o) That a lease for years may operate as to part by estoppel, and as to the residue by passing an interest, see *Gilman v. Hoare*, 1 Salk. 275. But it is a rule, that estoppels ought to be mutual, otherwise neither party is bound by them; therefore if a man takes a lease for years of his own lands from an infant or feme covert by indenture, this works no estoppel on either part, because the infant or feme covert, by reason of their disability to contract, are not estopped. Post, 352 a. Cro. Eliz. 37. 700. A lessor is not estopped by his deed from going into evidence to show that a cellar, which is situate under the demised premises particularly described, was not intended to be demised. *Doe, d. Freeland v. Bent*, 1 T. R. 701. See further as to Estoppel, post, 352 a. Book III. Chap. 6. Of Pleading.—[Ed.]

limitations, as hereafter shall appear. Also they may make grants of ancient offices of necessity* with ancient fees, *concurrentibus hiis quæ in jure requiruntur*, for those grants are not within the statute of 32 H. 8. but by construction, they are not restrained by the statutes of 1 Eliz. and 13 Eliz. because these ancient offices be of necessity, and with the ancient fees, and so no diminution of revenue (24).

(Cro. Cha. 16.
47. 50. 10 Co.
58. Pollexf.
134. 4 Mod.
16. Finch.
191, 192, 193.
Cro. Cha. 48.
Cro. Jac. 173.)
(419)*

There be three kinds of persons that at this day may make leases for three lives, &c. in such sort as hereafter is expressed, which could not so do when Littleton wrote, viz.

By stat. 32 H.
8. tenants in
tail may
make leases
for three
lives or 21
years, so to
bind their
issue;

First, any person seised of an estate tail in his own right.

Secondly, any person seised of an estate in fee-simple in the right of his church.

and ecclesi-
astics, seised
jure ecclesie,
so as to bind
their succes-
sors;
and husband
and wife,
seised jure
uxoris, &c. so
as to bind
her and their
heirs.
(420)*

Thirdly, any husband and wife seised of any estate of inheritance in fee-simple or fee-tail in the right of his wife, or jointly with his wife before the coverture or after, viz. the tenant in tail, by deed, to bind his issues in tail (P), but not *the reversion or remainder; the

(24) "Vid. 29 Eliz. *Case of the Bishop of Chester*, who had anciently used to have a counsel who had a fee. This grantable by the bishop with consent of dean and chapter. *Nota*, though it be not an office of time which, &c. yet grantable, if of necessity, as in the case of the Bishop of Gloucester, founded within time of memory. M. 1 Car. C. B. Crook, n. 8. *Cook and Young*. *Vide* that it is holden, that though it be a new office, yet, if necessary, and the fee is reasonable, being confirmed, it shall bind the successor; and *vide* the grant of ancient office and fee, with the addition of a new fee, which notwithstanding seems good, because the office is ancient. M. 2 Car. C. B. Crook, n. 7. *Gee's case*. If it had been usual to grant an ancient office to one only, a grant to two is not good. But if it has been once granted to two or granted in reversion before the statute 1 Eliz., then it shall be intended to

have been usually so granted, and such grant to two, or in reversion, shall bind the successor. T. 8 Car. B. R. Crook, n. 2. *Walker and Lamb*, M. 8 Car. B. R. Crook, n. 19. *Young and Steele*, concerning the official and commissary of the Bishop of Lincoln, and the register of the Bishop of Rochester." Hal. MSS. Ley. 75. is contrary to *Gee's case*, cited by Lord Hale.—See further as to the grant of offices by ecclesiastical persons. New Abr. Offices, D. See also in Burr. part 4. vol. 1. page 219. *the case of Sir John Trelawney and the Bishop of Winchester*, in which the court held, that an office and fee which existed before the 1st of Eliz. are not within the restraint of that statute, but that they may be granted, as before the statute, and that the utility or necessity of the office is not more material since than it was before.—[Hargrave, n. 1: 44 a. (255).]

(P) In consequence of the statute *De donis*, all leases made by tenants in tail might have been avoided by their issue, or by the persons entitled to the remainder or reversion; but by the 32 H. 8. c. 28. leases made according to the directions of this statute, will be binding on the issue in tail. But, if the tenant in tail dies without issue, no lease made by him, though pursuant to the statute, will bind the remainder-man or reversioner. *Infra*, 44 a.

A lease by tenant in tail, which is warranted by the 32 H. 8., will not create a discontinuance, because an act of parliament, to which every man is a party, allows of such leases: and therefore if a warranty is annexed to such a lease, it will not work a discontinuance, for it will determine with the lease. Post, 333 a. Vaugh. 383. But it is otherwise of a lease for three lives if it be not warranted by the statute; because it is a greater estate than the tenant in tail can make, and passes by livery, which takes the estate from the tenant in tail, and turns it into a reversion in fee, determinable upon three lives. *Walter v. Jackson*, 1 Rol. Abr. 633. 4 Cru. Dig. 119.—[Ed.]

bishop, &c. by deed, without the dean and chapter, to bind his successors; the husband and wife, by deed to bind the wife, and her and their heirs (25); and these are made good by the statute of 32 H. 8. which enableth them thereunto.

Circumstances requisite to these leases.

But to the making good of such leases by the said statute, there are nine things necessarily to be observed belonging to them all, and some other to some of them in particular.

5 Co. 6. Seig. Mountjoy's case. (3 Lev. 438. Cro. Ja. 94. 458.)

First, the lease must be made by deed indented, and not by deed poll, or by parol (26).

Secondly, it must be made to begin from the day of the making thereof, or from the making thereof (27).

*41 b.
5 Co. 2. Elmer's case.

*Thirdly, if there be an old lease in being, it must be surrendered (28) or expired, or ended within a year of the making of the lease, and the surrender must be absolute and not conditional (a).

(25) "*Quoad* leases by husband and wife. Husband and wife seised to them, and the heirs of the body of the husband make lease for three lives, rendering the ancient rent; husband dies: this shall not bind the wife. Adjudged, because the statute speaks of the wife's inheritance. H. 14 Eliz. C. B. n. 5. D. D. Husband and wife jointly seised by purchase to them and their heirs; the husband alone during the coverture makes lease, rendering the ancient rent: *dubitat*ur if it shall bind the wife, because the proviso, which requires the wife's joining, speaks only of husband seised in right of his wife, *finitur per compositionem*. M. 1 Car. C. B. Crook, n. 15. *Smith and Trinden*." Hal. MSS.—[Hargr. n. 2. 44 a. (256).]

(26) See New Abr. leases, (E 2.)—[Hargr. n. 3. 44 a.]

(27) "*Vid.* 7 Eliz. Dy. 246. Lease for 20 years to begin at next Michaelmas seems good." Hal. MSS.—See further as to the time when such leases should begin, and the difference between *from the day of making* and *from the making*. New Abr. Leases, (E) rule 2. and ante, 46 b. p. 408.—[Hargr. n. 4. 44 a. (257).]

[See ante, p. 408. n. (D).]—[Ed.]

(28) "*Feme* covert tenant for life; reversion in tail; husband surrenders; tenant in tail leases for three lives; the wife dies. Adjudged, that this is a good lease to bind the issue. *Sydenham and Cops*, cited by Popham. Mo. 783." Hal. MSS.—[Hargr. n. 1. 44 b. (258).]

(a) A surrender upon condition, that the lessor should make a new lease within a week after, has been held to be good. The lessor of the plaintiff, being a prebendary of Old Sarum, brought an ejectment to avoid a lease made by his predecessor, as not being conformable to the above proviso in the stat. 32 H. 8. His objection was, that the surrender made of the former lease was with a condition, that if the then prebendary did not within a week after grant a new lease for three lives, the surrender should be void; whereby, as it was contended for the plaintiff, the old term was not absolutely gone, but the lessee reserved a power of setting it up again. But the court, after two arguments, gave judgment for the defendant; this being within the intent of the statute, which was, that there should not be two long leases standing out against the successor. Here, the new lease was made within the week, and from thence it became an absolute surrender both in deed and law. And the whole was out of the lessee without further act to be done by him. In the proviso in the statute there was the word *ended* as well as *surrendered*; and could any one say the first lease was not at an end? This was no more than a reasonable caution in the first lessee, to keep some hold of his old estate, till a new title was made to him. *Wilson, d. Eyres v. Carter*, 2 Stra. 1201. A surrender in law by the taking of a new lease, either to begin presently, or on a day to come, seems a good surrender within these statutes; for by taking such new lease, though it be to commence at a future day, the first lease is presently surrendered and gone, and shall not continue good till the day on which the second lease is to commence: but by acceptance of such second lease, the first is imme-

Fourthly, there must not be a double lease in being at one time; (421) as if a lease for years be made according to the statute, he in the reversion cannot expulse the lessee, and make a lease for life or lives according to the statute, nor *è converso*; for the words of the statute be, to make a lease for three lives, or one-and-twenty years, so as one or the other may be made, and not both (29).

Fifthly, it must not exceed three lives, or one-and-twenty years, from the making of it, but it may be for a lesser term or fewer lives. (Cro. Cha. 85. Cro. Ja. 112. 173.)

Sixthly, it must be of lands, tenements, or hereditaments, manurable or corporeal, which are necessary to be letten, and whereout a rent by law may be reserved, and not (e) of things that lie in grant, as advowsons, fairs, markets, franchises, and the like, whereout a rent cannot be reserved (30). (2) 5 Co. 3. Jewel's case. 17 E. 3. 75. 9 Ass. 24. 14 E. 3. Scire facias, 22. 10 H. 6. 2. 3 H. 6. 21. (1 Sid. 316, 317. 416. Cro. Eliz. 708.)

Seventhly, it must be of lands or tenements which have most commonly been letten to farm, or occupied by the farmers thereof by the space of twenty years next before the lease made, so as if it be letten for eleven years at one or several times within those twenty years, it is sufficient (x). A grant (f) by copy of court roll, in fee, for life or years, is a sufficient letting to farm within this statute, for he is but tenant at will according to the custom, and so it is of a lease at will by the common law; but those lettings to farm must be made by some seised of an estate of inheritance, (422) (3) 6 Co. 37. Dean and chapter of Worcester's case.

(29) "M. 29. 30 Eliz. Clench. 138. *Crindal's case*." Hal. MSS.—See S. C. 4 Leon. 78. 1. and 65. and Mo. 107. and the observations upon it in New Abr. Leases, (E.) rule 3.—[Hargr. n. 2. 44 b.]

(30) "But if tithes have been usually let to farm, they cannot be leased for life to bind the successor; but they may be leased for 21 years, rendering the ancient rent, and it shall bind the successor. Mo. 778. T. 2 Jac. B. R. Adjudged in *Denny's case*, and the rent goes with the reversion. *Nota*, it was the case of the precentor of Paul's." Hal. MSS.—See New Abr. Leases, E. rule 5,

where many authorities are cited to prove this difference between leasing tithes for life and for years, and that in the latter case the lease will bind the successor because he may have debt for the rent, which will not lie for him on a freehold lease. But the distinction is no longer of any importance; for the 5 G. 3. c. 17. makes leases of tithes and other incorporeal hereditaments by ecclesiastical persons, whether for lives or for years, as good as if the leases were of corporeal hereditaments, and gives action of debt to the successor, for rent reserved on freehold leases.—[Hargr. n. 3. 44 b. (259).]

diately determined, because both leases cannot exist together, and the first cannot be dissolved or surrendered in part, and therefore must be surrendered for the whole. *Thompson v. Trafford*, Poph. 9. Plowd. 106. Comp. Incumb. 345, 346.—[Ed.]

(x) Upon the construction of this clause (which, in order to prevent the falling off of hospitality, prohibited the persons enabled by the statute to demise, from making leases of their mansion houses and demesnes, so as to bind their heirs or successors), various opinions have been entertained. The better of them seems to be, that it consists of two parts in the disjunctive, and if either of them be observed, it is sufficient to support the lease. The first is, "which have not most commonly been letten," which is general. The other is, "or occupied by the farmers thereof by the space of twenty years, &c.:" and the most natural and genuine meaning of the words is, that the lands to be leased must either be such as have been most commonly letten, that is, such as are not reputed part of the demesnes, or such as have been occupied by the farmers thereof by the space of twenty years. 4 Bac. Abr. 75, 76. tit. Lease (E). 4 Cru. Dig. 126.—[Ed.]

and not by a guardian in chivalry, tenant by the curtesy, tenant in dower, or the like (31).

5 Co. 6. Seig.
Mountjoy's
case.

(Cro. Jam. 76.)

5 Co. 5. Seig.
Mountjoy's
case. 6 Co. 37.

6 Co. 37, 38.
Dean and
chapter of
Worcester's
case.

(423)*

5 Co. 5. Seig-
nior Mount-
joy's case.
6 Co. 37.
Lord Mount-
joy's case,
ubi supra.

(Cro. Cha. 6.
17.)

Eighthly, that upon every such lease, there be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors, &c. so much yearly farm or rent, or more, as hath been most accustomably yielded or paid for the lands, &c. within twenty years next before such lease made (32). Hereby first it appeareth (as hath been said) that nothing can be demised by authority of this act, but that whereout a rent may be lawfully reserved. Secondly that where not only a yearly rent was formerly reserved, but things not annual, as heriots, or any fine or other profit at or upon the death of the farmer, yet if the yearly rent be reserved upon a lease made by force of this statute, it sufficeth by the express words of the act. Thirdly, if he reserve more than the accustomable rent, it is good also by the express letter of the act; but if twenty acres of land have been accustomably letten, and a lease is made of those twenty, and of one acre which was not accustomably letten, reserving the accustomable yearly rent, and so much more as exceeds the value of the other acre, this lease is not warranted by the act, for that the accustomable rent is not reserved, seeing part was not accustomably letten, and the rent issueth out of the whole. Fourthly, if tenant in tail let part of the land accustomably letten, and reserve a rent *pro rata*, or more, this is good, for that it is in substance the accustomable rent (s). Fifthly, if two coparceners be tenants in tail of twenty acres, every acre of equal value, and accustomably letten, and they make partition, so as each have ten acres, they may make leases, of their several parts each of them, reserving the half of the accustomable rent. Sixthly, if the accustomable rent had been payable at four days or feasts of the year, yet if it be

(31) "Lease by the king during vacancy of bishoprick will not enable. P. 19 Jac. B. R. *Denny's case*. Vid. Dy. 271." Hal. MSS.—[Hargr. n. 4. 44 b. (260).]

[See 4 Bac. Abr. 74, 75. tit. Leases, (E).] —[Ed.]

(32) "6 Rep. 37. T. 3 Jac. Crook, n. 6." Hal. MSS. See Cro. Jam. 76.—[Hargr. n. 5. 44 b.]

(s) The books are not agreed whether a tenant in tail, bishop, &c. may make a lease of part of lands which have been usually let for a certain rent, reserving a rent *pro rata*. For it is said, that if bishops, &c. have the power of dividing their farms, and leasing them out in smaller parcels, the whole estate is no longer answerable for the whole rent. The security is lessened by such a division, and there may possibly be an entire deficiency of remedy for portions of the rent. And therefore, where a division was deemed necessary, it has, in some instances, been thought advisable, on account of this possible injury to the successor, to apply for the aid of the legislature. See the private act of parliament, 35 Geo. 3. c. 109. empowering the bishop of Ely to grant out estates belonging to his see, in several smaller parcels. But the better opinion appears to be, agreeably to what is here said by Lord Coke, that such leases are good, because the ancient rent is in fact reserved, and otherwise perhaps they would not lease at all if they had not a power of dividing the great farms. 4 Bac. Abr. 86. tit. Leases (E). And now the doubt to the contrary has, so far as it relates to ecclesiastical leases, been removed by a late act of parliament, stat. 39 & 40 Geo. 3. c. 41. This act, however, does not remove the doubt as to leases by tenants in tail, or husband seised *jure uxoris*; nor does it validate leases by ecclesiastical persons of two or more farms together, which have been usually let separately. Sugd. Pow. 611.—[Ed.]

reserved yearly, payable at one feast, it is sufficient, for the words of the statute be, reserved yearly (τ).

*Ninthly, nor to any lease, to be made without impeachment of waste. Therefore if a lease be made for life, the remainder for life, &c. this is not warranted by the statute, because it is dispunishable of waste. But if a lease be made to one during three lives, this is good, for the occupant, if any happen, shall be punished for waste (33). The words of the statute be "seised in the right of his church," yet a bishop that is seised *jure episcopatus* a dean of his sole possessions *in jure decanatus*, an archdeacon *in jure archidiaconatus*, a prebendary, and the like, are within the statute, for every of them generally is seised *in jure ecclesiæ* (34) (v).

(424)*
Dean and
chapter of
Worcester's
case, ubi su-
pra.
Dean and
chapter of
Worcester's
case, ubi su-
pra.

(33) "Prebend makes lease for years, reserving the running of a colt, rendering rent. A new lease, rendering the same rent, without reserving the running of a colt, adjudged good; because *quoad* this it is neither reservation nor exception. But if lease be of a manor except the woods, rendering rent, and after the expiration of it there is a new lease rendering the same rent without such exception, the second lease is bad. T. 18 Jac. B.R. *case of Precentor of Pauls*." Hal. MSS. —[Hargr. n. 6. 44 b. (261).]

(34) "Vid. for leases by bishop, tenant in tail, &c.—A. seised in tail of a manor, of which three acres parcel of the demesnes had been usually demised at 5s. rent, and the residue not, demises the three acres and

also the manor *habendum* for 21 years, rendering for the three acres, and all other the premises therewith demised 5s. and for the manor 5l. This is good to bind the issue for the three acres, but not for the residue. H. 37 Eliz. *Tanfield and Rogers*.—The bishop of G. seised of a manor, of which one tenement was usually demised for life at 5s. rent, and the manor usually at 10s. rent, makes lease of the tenement for three lives, rendering 5s. and afterwards leases the whole manor for three lives to another, rendering rent, and dies.—Ruled, 1. That the reversion of the tenement passes by the lease of the manor. 2. And therefore that the lease of the manor *quoad* the tenement shall not bind the successor, because then

(τ) Where variety of rents have been reserved, as formerly 10l.; then 20l.; then 30l.; and, lastly, 40l. per annum; or *e contra* formerly 40l.; then 30l.; then 20l.; and, lastly, 10l. per annum; the 10l. in the one case, and the 40l. per annum in the other case, are the rents to be reserved on any new lease to be made by virtue of the statutes mentioned in the text. But herein there is a difference between leases made under these statutes and leases by virtue of powers in private conveyances and settlements, reserving the old and accustomed yearly rent, or the most ancient and accustomable yearly rent; for in such last mentioned leases the rent reserved on any lease then in being, or upon the lease made last before such settlement or conveyance, seems to be the measure of the reservation upon any lease to be afterwards made by virtue thereof; for the intent of such power, as well in such settlements as upon the several acts before-mentioned, was only that they, who were to make leases by virtue thereof, should not put the estate in any worse condition than it was at the time of such settlement, or of those acts made, but keep it in the same plight and condition as it then respectively was; and the rent reserved last before the making of such settlement, or of those acts, may well be called old or ancient, in respect of the new rent to be reserved on such subsequent lease. *Per Hale, C. J. Morice v. Antrobus*, Hardr. 325, 326. And, notwithstanding the doubt expressed by Lord Cowper, in the case of *Lord Moken and Orby*, (3 Vern. 531—542.) the above rule is considered the most certain and proper. *Pow. on Powers*, 549. *Hoc v. Rawlins*, 7 East, 279. However, the practice of reserving the ancient or usual rent, on leases by virtue of these powers, is now exploded: and the power of leasing commonly introduced into settlements of estates in England, requires the best rent to be reserved, and expressly prohibits the taking of fine. Whether the best rent is reserved, is a point to be decided by a jury. *Sugd. Pow.* 603—607. See further as to the reservation of rent under powers of leasing, in the note at the end of this chapter.—[Ed.]

(v) The 33 H. 8. c. 28. extends only to sole corporations, as bishops, deans, &c., but corporations aggregate, as deans and chapters, &c. though seised in right of their churches,

(425)*
Parson and
vicar not
within this
statute.
3 E. 6. 1 Mar.
tit. Leases.
Bro. 62.
(Finch. 191.)

*But a parson and vicar are excepted out of the statute of 32 H. 8., and therefore, if either of them make a lease for three lives, &c. of lands accustomably letten, reserving the accustomed rent, it must be also confirmed by the patron and ordinary; because it is excepted out of 32 H. 8. (35) and not restrained by the statutes of *primo* or 13 Eliz. (w).

there would be six lives in being for the tenement, and the lessee would be dispunishable of waste. 3. It seems, that the lease of the manor is also voidable, because the rent issues also out of the tenement. (*Quære* of this, for here the rent as well for the tenement as for the manor is reserved on the second lease, so that though the tenement should be evicted the entire rent for the manor would continue.) 4. But it was agreed, that the lease of a copyhold manor usually demised, or of a manor consisting of de-

mesnes, copyholds, and services usually demised, is good to bind the successor. 5. The lease is only voidable by the successor; and therefore if he accepts the rent, it is good against him. M. 30 Jac. C. B. *Bishop of Gloucester* against *Wood*, M. 5 Car. C. B. *Sheir* and *Penter*, on lease by the bishop of Exeter." Hal. MSS.—[Hargrave, n. 7. 44 b. (262).]

(35) "Prebend simple or prebend with office, as is precentor, is enabled by the statute 32 H. 8. Adjudged Bro. Leases 62.

are not within the statute; for they, by the consent of the major part of them, might have made any leases or grants of their estates without limitation before this statute, and so they might have done after, until by subsequent statutes they were restrained, this being merely enabling, and not at all restraining them; and though before this statute the sole corporations above mentioned could not, without the consent and confirmation of others, have made leases for three lives, or twenty-one years, yet with confirmation they might have made longer leases, or absolute alienations, of any of their possessions: and therefore to restrain bishops and other ecclesiastical persons were the statutes of 1 & 13 Eliz. made. 10 Co. 60 a. 4 Bac. Abr. 41. tit. Leases (E). The first of these disabling statutes, 1 Eliz. c. 19. enacts, that all grants by bishops and archbishops, other than for the term of one-and-twenty years or three lives, from the making, or without reserving the usual rent, shall be void. But this statute not extending to grants made by any bishops to the crown, was of little effect, as many estates were granted to the queen upon design, that she should grant them over to others. To prevent which, for the future, the stat. 1 Jac. 1. c. 3. extends the prohibition to grants and leases made to the king. 11 Co. 71. Gibbs. Cod. 679. The restrictions laid by the 1 Eliz. c. 19. on bishops, are extended by statute 13 Eliz. c. 10. to all other ecclesiastical persons. The lastmentioned statute has been always construed largely and beneficially, to prevent all evasions against its true intent; and, therefore, where the statute says, master and fellows of any college, yet it has been often held, that whether the college be incorporated by that name, or by the name of warden and fellows, or by any other name of corporation, and whether the college be temporal for the advancement of the liberal arts and sciences, or mere ecclesiastical, or mixt, yet all these are within the restraint of this act. *Magdalene College case*, 11 Co. 76. There being, however, no provision in the stat. 13 Eliz. c. 10. to restrain leases in reversion, it was found necessary to provide against them by another statute, viz. the 18 Eliz. c. 11. (continued by stat. 43 Eliz. c. 29.), which enacts, that all leases, to be made by any ecclesiastical, spiritual, or collegiate person or others, within the 13 Eliz. c. 10., of any lands, &c. whereof any former lease for years is in being, and not to be expired, surrendered, or ended, within three years next after the making of any such new lease, shall be void and of no effect. Another statute concerning college leases, viz. the 18 Eliz. c. 6. directs, that one third of the old rent, then paid, should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6s. 8d. or a quarter of malt for every 5s.; or that the lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges, on the market day before the rent becomes due. This has proved a beneficial regulation to the colleges. But as both the money and corn rents united are yet far below the present value, the colleges, in order to obtain the full value of the term, take a fine upon the renewal of their leases. 2 Bl. Com. 322. ed. Chr. With respect to the statute 14 Eliz. c. 11. which repeals the 13 Eliz. c. 10. as to houses in cities and towns, see n. (38) *infra*.—[E.]

(w) See III. 108. n. (O). The leases of beneficed clergymen were made void, in case of their non-residence, by the stat. 13 Eliz. c. 20: but that statute, together with all expla-

* And what hath been said concerning a lease for three lives, doth (426)* hold for a lease for one-and-twenty years.

Thus much shall suffice to have spoken of the enabling statute of 32 H. 8. the better to enable the reader to understand both this and that which follows. Now to speak somewhat of the disabling statutes of 1 Eliz. and 13 Eliz. (36), the words of the exception out of the restraint and disability of 1 Eliz. are, *other than for the term of twenty-one years, or three lives, from such time as any such grant or assurance shall be given, whereupon the old and accustomed yearly rent, or more, shall be reserved*: and to that effect is the exception in the statute of 13 Eliz. First, it is to be understood that neither of these disabling acts, nor any other, do in any sort alter or change the enabling statute of 32 H. 8. but leaveth it for a pattern in many things for leases to be made by others. Secondly, it is to be known, that no lease made according to the exception of 1 Eliz. or 13 Eliz. and not warranted by the statute of 32 H. 8. if it be made *by a bishop, or any sole corporation, but it must be confirmed by the deans and chapters, or others that have interest, as hath been said in the case of the parson and vicar, but examples do illustrate.

By stat. 1 Eliz. 13 Eliz. and 1 Jac. ecclesiastical persons and corporations are disabled to make leases, except for 21 years, or three lives.

Stat. 32 H. 8. not altered by the disabling statutes.

*45 a. (Cro. Eliz. 874.) (1 And. 66.)

If a bishop make a lease for twenty-one years, and all those years being spent, saving three or more; yet may the bishop make a new lease to another for twenty-one years, to begin from the making, according to the exception of the statute, but not a lease for life or lives, as hath been said; and this concurrent lease hath been resolved to be good (37), as well *upon the exception of 1 Eliz. in the case of bishops, as upon 13 Eliz. (38) which extend to spiritual and

After lease for 21 years under the disabling statutes, a concurrent lease for years to begin from the making is good: (427)*

M. 36, 37 Eliz. *Watson and Major*, T. 18 Jac. case of *Precentor of Paul's*. Hal. MSS.—[Hargr. n. 8. 44 b. (263).]

(36) “*Nota* these disabling statutes extend only to their own possessions. The archdeacon of Ely, 12 Eliz. makes lease for 50 years, which after the statute 13 Eliz. is confirmed by the bishop and dean and chapter. Ruled, that this is a good lease to bind the successor, though after the statute 1 Eliz. and though confirmed after the statute 13 Eliz. H. 37 Eliz. Rot. 882. *Sir Edward Denny's case*.” Hal. MSS.—[Hargr. n. 9. 44 b. (264).]

(37) Accordingly adjudged, though the concurrent lease was to commence a *datus indenturæ*. T. 21 Eliz. Rot. 124. *Fox* and

Collier. M. 22, 23 Eliz. C. B. Rot. 2409. *Scot and Brewster*. H. 22 Jac. Br. Rot. 11. *Evans and Ascu* adjudged. T. 3 Car. P. 33 Eliz. W. 14. *Southcot's case*. Hal. MSS.—[Hargr. n. 1. 45 a.]

(38) “*Nota*, the statute 13 Eliz. chap. 10. *quoad* tenements in cities is altered by the statute 14 Eliz. chap. 11. which permits leases of them for 40 years; and therefore it has been ruled, that covenants for renewing leases of messuages in cities are not prohibited by the statute 18 Eliz. cap. 11. which only restrains leases against the statute of 13 Eliz. Hob. case 352. *Crane and Taylor*.” Hal. MSS. See Hob. 269.—[Hargr. n. 2. 45 a. (265).]

[The statute 14 Eliz. c. 11. enacts, that

nations, additions, and alterations thereof, made by several statutes in the fourteenth, eighteenth, and forty-third years of her said majesty's reign, and also so much of an act passed in the third year of Car. 1. whereby the same were made perpetual, are repealed by stat. 43 Geo. 3. c. 84. s. 10. And by the same act it is further enacted, that all contracts or agreements for letting houses of residence, together with their appurtenances, in which any spiritual person shall be required by the bishop to reside, shall be void: and all persons holding possession of the same after the day appointed for such residence, shall forfeit for every day the sum of forty shillings. Sect. 34.—[*Ed.*]

secus if it be
for life.
(1 Leon. 59.)

ecclesiastical corporations, aggregate of many, as deans and chapters, &c. which 32 H. 8. did not: but in the case of the concurrent lease, in the case of the bishop, it must be confirmed. Also the exception of 1 Eliz. and 13 Eliz. doth differ from the statute of 32 H. 8., for the leases for years to be made according to the exceptions of the statutes of 1 and 13 Eliz. must begin from the making, and not from the day of the making (x), but by force of 32 H. 8. from the day of the making. And although the statutes of the first and thirteenth of Eliz. do not appoint the lease to be made by writing, yet must it therein, and in the other eight properties or qualities before mentioned and required by 32 H. 8., follow the pattern thereof (the concurrent lease only except) (39). Although the exception in 1 and 13 Eliz. concerning the accustomed rent, is more general than that of 32 H. 8., and there is not any provision for leases made dispunishable of waste, &c.: yet must the pattern of 32 H. 8. be followed: for leases without impeachment of waste made by such spiritual and ecclesiastical persons, are unreasonable and causes of dilapidation* (y). Thus much have I thought good to lead the

the 13 Eliz. c. 10. shall not extend to houses in cities and towns, but that the same may be granted as they might have been before the 13 Eliz. (even in fee, so that a full recompense be made of as good value), and leases may be made of houses for 40 years, charging the lessee with repairs, &c. provided that no lease be permitted to be made by force of this act in reversion. Note, that this statute relates only to the persons restrained by the 13 Eliz. c. 10. and it makes no alteration in the 1 Eliz. c. 19. Therefore it gives no power to bishops (who are restrained by the 1st only, and are not within the 13th Eliz.) to let houses otherwise than according to 1 Eliz. c. 19.

The statute of 18 Eliz. c. 11. has relation only to the 13 Eliz. c. 10. to restrain leases

in reversion where above three years of the first lease is then to come, but leaves the statute of 14 Eliz. c. 11. perfectly at large as to houses in cities without making void such leases, or any bonds or covenants concerning them; for as to such houses, the statute of 14 Eliz. c. 11. is a new law, and sets loose the 13 Eliz. c. 10. *Crane and Taylor*. Hob. 269. And see 1 Vent. 245. where it is said, that the reason of repealing 13 Eliz. c. 10. as to houses in market towns, was to render those places more populous. —[*Ed.*]

(39) "H. 44 Eliz. C. B. n. 14. D. D. *Bishop of Hereford* against *Scory*. Adjudged accordingly, where the land had not been usually demised." Hal. MSS. —[*Hargr. n. 3. 45 a.*]

(x) See ante, p. 420. n. (37). —[*Ed.*]

(y) If a bishop solely make a lease for twenty-one years according to the 39 H. 8. c. 28. and within four or five years or more, before the end of that lease, make a new lease to another for twenty-one years, to begin from the making, &c., this second lease, if it be confirmed by the dean and chapter, and be in every thing else pursuant to the exception in the 1 Eliz. c. 19. is good as a concurrent lease: 1st. Because such lease, though not good within the 32 H. 8. c. 28. (owing to the first lease not having been surrendered or expired within a year after the making thereof), yet, being confirmed by the dean and chapter, remains a good lease at common law, and consequently, if it be not void within the exception of 1 Eliz. c. 19. the successor shall be bound; and that it is not void within that statute, appears both from the letter and meaning of the exception; for this second lease does not exceed twenty-one years from the time it begins, being for twenty-one years only from the making, and so within the express words of the exception: and, 2dly, It is not void within the meaning of the exception, because, for so many years as were to come of the first lease, this is good only by estoppel, and not in interest; for the second lessee can have no benefit of it so long as the first lease endures, and consequently the second lease being void for all the years that are to come of the first lease, there is against the successor, in effect, no more than a lease for twenty-one years; and therefore such concurrent lease is not against the meaning of that exception. *Fox v. Collyer*, 1 And. 65. pl. 140. Mo. 107. pl. 251. 4 Bac. Abr. 64. Leases, (E), Rule 3. Sed vide Sugd. Pow. 593—600. In the same manner might deans and chapters, masters and fellows of any college, and other ecclesiastical per-

studious reader by the hand, and to conduct him in the right way, and to put all these things together upon consideration had of all the statutes, which otherwise might have *prima facie* seemed to him a diffuse and dark labyrinth.

And albeit it be provided by the said acts of 1 and 13 Eliz. that all grants, &c. leases, &c. made, &c. (other than leases for three lives, or one-and-twenty years, according to those acts) should be utterly void and of none effect, to all intents, constructions, and purposes, yet grants, or leases, &c. not warranted by those acts are not void, but good against the lessor, if it be a sole corporation: or so long as the dean or other head of the corporation remain, if it be a corporation aggregate of many (40): for the statute was made in benefit *of the successor (41) (z). But let us now return to our author (A 1).

Leases, &c. not warranted by these acts void, as against successors only.

3 Co. 59, 60. Lincoln College case, p. 39. Eliz. inter Hunt and Singleton, lb. (429)*

(40) “*Nota*, lease for three lives by bishop, not warranted by the statute, is not voidable against himself, but shall bind him. M. 44, 45 Eliz. C. B. D. D. n. 32. *Saunders’s case*. And it is not void, but only voidable against the successor, for if he accepts the rent the lease is good against him. M. 8 Car. C. B. Crook, n. 21. *Owen and App-Rees*. But lease by A. dean of B. and his chapter not warranted, is void immediately against A. himself. Adjudged so, because the corporation is aggregate. M. 13 Car. B. R. *Lloyd and Gregory*.” Hal. MSS.—The case of *Lloyd and Gregory* is re-

ported in Cro. Cha. 502. W. Jo. 405. 1 Rol. Abr. 728. and 2 Rol. Abr. 495. But none of these books mention the point to which Lord Hale cites the case. See New Abr. Leases, H. where several authorities besides that of Lord Coke are cited to show, that a lease by a corporation aggregate, though not warranted by the statutes, is good for the time of the person who was head of the corporation when the lease was made. See also Ante, 43 a. n. 1. (Ante, p. 219, 220. n. (31)).—[Hargr. n. 4. 45 a. (266).]

(41) See further as to leases by tenants in tail, husband and wife, and ecclesiastical

sons, have made concurrent leases, not being restrained therefrom by the 13 Eliz. c. 10; but that being attended with mischievous consequences, was remedied by the 18 Eliz. c. 11. which makes void leases by any of the said ecclesiastical persons of their possessions, whereof any former lease for years is in being, not to be expired, surrendered, or ended, within three years after the making of any such new lease; so that within these bounds they may likewise make concurrent leases for years. 4 Bac. Abr. 66. Leases (E), Rule 3.—[Ed.]

(z) If a bishop make a lease for four lives, and one of them dies in the life of the bishop, so that at his death there are but three lives in being, yet the lease will be void against the successor; for, as it was originally void by 1 Eliz. no subsequent event can make it good. 10 Co. 62 a. But if a lease be made to A. for the life of B., C., and D., it is a good lease to one for the lives of three other persons, and a lease to three for their lives is all one within the intent of these statutes: for in both three lives are the measure of the estate created, which is all that the statutes require. *Baugh v. Haynes*, Cro. Jac. 76.

It seems, that a lease for sixty years, if three lives shall so long live, is good within the 32 H. 8.; for in *Whitlock’s case* (8 Co. 69 b.) it was laid down, that if a man has power to make leases absolutely or generally, as the several persons comprised in the statute 32 H. 8. have, and a proviso or restraint comes after, as in that act, that such leases shall not exceed twenty-one years, or three lives, there a lease for ninety-nine years, determinable on two or three lives, was good, within the first part of the act, and not made void by the last part thereof, because it does not exceed the three lives thereby allowed, though it be not directly for three lives. But a lease for ninety-nine years, determinable on three lives, could not be supported under the disabling statutes of 1 Eliz. and 13 Eliz., for the first part of these acts makes void all estates, gifts, grants, &c.; and the last part only saves leases for twenty-one years, or three lives, so that a lease of this kind being void by the first part of these statutes, and not within the saving of the last part, being neither for twenty-one years, nor three lives, shall not bind the successor. 4 Bac. Abr. 70. Leases (E), Rule 4.

It only remains to observe, that corporations of mayor and commonalty, bailiffs and bur-

(430)* *"A man letteth."* Here Littleton putteth this case where one letteth, &c. It is therefore necessary to be seen what the law is

Lease by tenant of the land, and a

persons, in Vin. Abr. tit. Estates, and tit. Confirmation, and New Abr. tit. Leases; which title in the latter book is generally attributed to Lord Chief Baron Gilbert, and

comprises a most copious and excellent treatise on a very difficult and extensive subject.—[Hargr. n. 5. 45 a.]

gesses, and other lay corporations, are out of all the beforementioned statutes, and may make leases, and other estates, as they might ever have done. Sid. 162. Ante, vol. 1. p. 195, 196. n. (N). But with respect to corporations holding to charitable uses, if they alien for purposes not charitable, though the alienation will be binding at law, yet in equity the alienee will be considered as a trustee for the charity. *The Mayor and Commonalty of Colchester v. Lowten*, 1 Ves. & B. 246. So it has long been settled, that a lease for a charity estate may be set aside for undervalue, if considerable. See *The Poor of Yervel v. Sutton*, Duk. Ch. Ca. 43. *Eltham Parish v. Warreyn*, Id. 67. *The Attorney-General v. Gower*, 9 Mod. 224. *The Attorney-General v. Maywood*, 18 Ves. 315. And trustees for a charity cannot without an adequate consideration let for ninety-nine years, that not being the ordinary course of provident management: much less can they make a lease with a covenant for perpetual renewal without an equivalent for the inheritance. *The Attorney-General v. Brooker*, 18 Ves. 326. Et vid. *The Attorney-General v. Owen*, 10 Ves. 555. *The Attorney-General v. Green*, 6 Ves. 452. *The Attorney-General v. Griffith*, 13 Ves. 565. All these cases proceeded on a breach of trust by trustees: but in the case of a vicar and churchwardens, who had granted leases for 1000 years under an unlimited power to lease given by act of parliament: the court refused to give relief, and held that the leases were valid. *Attorney-General v. Moses*, 2 Mad. Rep. 294.—[Ed.]

(A 1) With respect to the persons by whom leases may be made, it may be further observed, that joint-tenants, coparceners, and tenants in common, may either make leases of their undivided shares, or else may all join in a lease of the whole to a stranger. If parceners or joint-tenants join in a lease, this shall be but one lease; for they have but one freehold: but if tenants in common join in a lease, it shall be several leases of their several interests. 2 Rol. Abr. 64. 4 Com. Dig. Estates 55. (G 6.) Sheph. Touch. 268. n. 3. One joint-tenant or tenant in common may make a lease of his part to his companion; for this only gives a right of taking the whole profits, when before he had but a right to the moiety thereof; and he may contract with his companion for that purpose, as well as with a stranger. Ante, 186 a. vol. 1. p. 733. Cro. Jac. 83. 611.

Tenants by the curtesy and in dower, and tenants for life, cannot make leases to continue longer than for their own lives. Supra, 47 b. p. 416. But where the remainder-man or reversioner joins with the tenant for life in making a lease, it is good, and is considered, during the life of the tenant for life as his lease, and the confirmation of the remainder-man or reversioner: and, after the death of the tenant for life, it is considered as the lease of the remainder-man or reversioner, and the confirmation of the tenant for life. *Treport's case*, 6 Co. 14 b. 2 Prest. Conv. 141, 142. Infra, 45 a. But it has been determined, that a lease executed by a tenant for life, in which the reversioner who was then under age was named as a party, but did not execute it, was void on the death of the tenant for life: and that an execution of it afterwards by the reversioner did not make it good. *Ludford v. Barber*, 1 T. R. 86. and see *Doe, d. Martin v. Watts*, 7 T. R. 83. Tenants for years also, as they may assign or grant over their whole interest, so they may grant it for any fewer number of years than those for which they hold: and such derivative lessees are equally compellable to pay rent, and perform the covenants agreed upon in such leases. But a termor, who lets to an under-tenant, cannot, after his term expired, enforce the continuance of the under-tenancy by distress, if the under-tenant refuses to acknowledge him as landlord, or pays under threat of distress, although the under-tenant still retains the possession. *Burne v. Richardson*, 4 Taunt. 720. So if the termor bring an ejectment against his tenant whose lease is expired, the latter is not barred from showing that his landlord's title is expired. *England, d. Syburn v. Slade*, 4 T. R. 682. *Doe, d. Jackson v. Ramsbotham*, 3 Maul. & S. 516. So executors or administrators, having terms of years vested in them in right of their testators or intestates, may lease the same for any fewer number of years; and the rent reserved on such leases will be assets in their hands, and go in a course of administration. 4 Cro. Dig. 129, 130. But it has been held, that a guardian in socage, or a testamentary guardian, cannot make a lease of his ward's lands, *Roe, d. Parry v. Hodgson*, 2 Wils. 129.

where divers join in a lease. If the tenant of the land, and a stranger which hath nothing in the land, join in a lease for years by deed indented of one and the self same land, this is the lease of the tenant only, and the confirmation* of the stranger, and yet the lease as to the stranger works by conclusion (42).

stranger, enures as the lease of the tenant only, and the confirmation of the stranger. (431)*

(2 Rol. Abr. 64.) Vid. sect. 246. 11 H. 4. 15 E. 4. 4 a. 27 H. 8. 16.

If two several tenants of several lands, join in a lease for years by deed indented, these be several leases, and several confirmations of each of them, from whom no interest passeth, and work not by way of conclusion in any sort, because several interests pass from them (43) (B 1).

Leases by two several tenants of several lands, enures as several leases, &c.

B. tenant for life of C., and he in the remainder or reversion in fee, having several estates in the one and the same land, join in a lease for years by deed indented, this demise shall work in this sort: during the life of C. it is the lease of B., and confirmation of him in the reversion or remainder, and after the decease of C. it is the lease of him in the reversion or remainder, and the confirmation of B.; for seeing the lessors have several estates, the law shall construe the lease to move out of both their estates respectively, and every one to let that which he lawfully may let, and not to be the lease only of tenant for life, and the confirmation of him in the remainder or reversion, neither is there any conclusion in this case, as shall be said hereafter. Tenant for life and he in the remainder in fee made a lease for years by deed indented, the lessee was ejected, and brought

Lease by tenant pur autre vie and remainderman, enures as the lease of the particular tenant during the life of cestui que vie, and afterwards as the lease of the remainderman. (1 Rol. Abr. 877. Mo. 72. 1 Leon. 177. Cro. El. 701. 6 Co. 15. Treport's case. Doc. Pl. 93.)

(42) "2 H. 5. 7. by Asht." Hal. MSS.—failed. M. 3 Jac. *Blakasper's case*. Noy, n. 43." Hal. MSS.—See Noy, 13.—[Hargr. n. 7. 45 a. (267).]

(43) "And therefore where the declaration in ejectment was of a joint demise of A. and B. and on the evidence it appeared that they were tenants in common, the plaintiff [Adj. acc. *Heatherley, d. Worthington v. Weston*, 2 Wils. 232. *Infra*, n. (B 1).—[Ed.]

135: though, perhaps, if it be limited to the term of his minority, such a lease may be good. See 2 Rol. Abr. 41. 4 Cru. Dig. 129. *Shaw v. Shaw*, Vern. & Scriv. 607. Ante, vol. 1. p. 157. n. 5.

With respect to leases by an infant, the rule is, that if the lease be beneficial to him, it is voidable only at his election, and not void. Ante, vol. 1. p. 177. n. 41. A lease by an infant reserving rent has been held to be *prima facie* good, because it is presumed to be for his benefit. But if a case of this kind were now to arise, the principle upon which its validity would depend, would be, whether it was beneficial to the infant or not. For very prejudicial leases may be made though a nominal rent be reserved; and there may be most beneficial considerations for a lease, though it contains no reservation of rent: and an infant may make a lease without rent, for the purpose of trying his title. 3 Burr. 1806. *Infra*, p. 432. n. 45. Married women being disabled by the common law from making any disposition of their possessions, cannot make leases; and therefore the statute 32 H. 8. enables husbands, together with their wives, to lease the lands of which they are seised in right of their wives; but leases not made pursuant to that statute are not binding on wives surviving their husbands. And if the wives die in the life-time of their husbands, their heirs may avoid them. 2 Saund. 180. n. 9. 4 Cru. Dig. 131. Lastly, all persons who have not capacity to contract, as idiots, lunatics, &c. are consequently incapable of making leases.—[Ed.]

(B 1) So if two tenants in common join in a lease for years, by indenture, of their several lands, this shall be the lease of each for their respective parts, and the cross confirmation of each for the part of the other, and no estoppel of either part; because an actual interest passes from each respectively. Rol. Abr. 877. 4 Bac. Abr. 193. Leases (O).—[Ed.]

an *ejectione firmæ*, and declared upon a demise made by tenant for life and him in remainder, and upon not guilty pleaded, this special matter was found, and that tenant for life was living, and it was adjudged (*g*) against the plaintiff; for during the life of the tenant (as hath been said) it is the lease of the tenant for life, and therefore during his life he ought to have declared of a lease made by him, and after his decease he ought to declare of a lease made by him in remainder (44). (*h*) And *the deed indented could be no estoppel in this case, because there passed an interest from them both. And whensoever any interest passeth from the party, there can be no estoppel against him, and (*i*) so it was adjudged. Hereby you shall understand your books the better which treat of those matters, and accordingly it was adjudged that where tenant in tail and he in the remainder in fee joined in a grant of a rent-charge by deed in fee, and after tenant in tail died without issue, the grantee distrained and avowed by force of a grant from him in the remainder, and upon *non concessit*, the jury found the special matter, and it was adjudged for the avowant; for every one granted according to his estate and interest.

(*g*) 27 H. 8.
(*h*) 13 a. 13
H. 7. 14. 2 H.
5. 7. 1 Co. 76.
Bredon's
case. (Post
302 b.)
(*i*) Mich. 36
& 37 El. in
the King's
Bench. Vid.
Mich. 6 & 7
Eliz. Dyer,
234, 235.
(432)*
(*i*) Hil. 41 El.
Rot. 1469, in
Communi
Banco, inter
Elice &
Cowne.

4. Leases
when void
or voidable.
*45 b.
(3 Co. 64 b.)

Leases for lives or years are of three natures: some be good in law; some be voidable by *entry, and some void without entry. Of such as be good in law, some be good at the common law, as made by tenant in fee, whereof Littleton here putteth his case: some by act of parliament; as tenant in tail, a bishop seised in fee in right of his church alone without his chapter, a man seised in fee-simple or fee tail in the right of his wife together with his wife, (as hath been said) may by deed indented make leases for 21 years or three lives in such manner and form as hath been said and by the statute (*k*) is limited, all which were voidable by the common law when Littleton wrote, and now are made good by parliament.

(*k*) 32 H. 8.
cap. 28.

Lease by infant at 15, though void at common law, may be good by custom. Leases by tenants in tail, or persons seised jure ecclesiæ, or jure uxoris, not warranted by enabling statutes, are voidable after the lessor's death. (Plowd. 264 b. Cro. Jac. 173.) (433)*

An infant seised of land holden in socage, may by custom make a lease at this age of 15 years, and shall bind him, which lease was voidable by the common law (45); voidable, some by the common law, after the death of the lessor, as of tenant in tail, a bishop, &c. or after the death of the husband (intended of leases not warranted by the said statute of 32 H. 8.); some voidable by act of parliament, as by a bishop though it be confirmed by dean and chapter, if it be *not warranted by the statute of 32 H. 8., and so of a dean and chapter after the death of the dean; some voidable at times by the lessor himself or his heirs, as by an infant, and the like. Some void *in futuro*, and some void *in præsentia*. In *futuro*, as if a tenant in tail make a lease for years, and die without issue, it is void,

(44) "Intratur H. 34 Eliz. Rot. 72. *King and Beny*." Hal. MSS.—[Hargr. n. 8. 45 a.]

(45) Heretofore some made a difference between leases by infants with reservation of rent and those without, and thought that the former were only voidable, but that the latter were absolutely void. New Abr.

Leases, (B.) But in a late case this distinction was denied, and it was said, that leases whether with or without rent, if made by *deed*, are voidable only. Burr. 4. part v. 3. page 1806.—[Hargr. n. 1. 45 b. (268).] [See n. (A 1) supra, p. 430.]—[Ed.]

as to them in reversion or remainder, though it be made (1) according to the said statute. If a prebend, parson, or vicar, make a lease for years, it is void by death, if it be not according to the statutes. Otherwise it is of a lease for life, for that is voidable, *et sic de similibus*.

Lease by tenant in tail according to the statute, the tenant in tail dying without issue, is void as to the reversioner.

(b) 33 H. 8. Dyer. 3 Co. 59, 60. in Lincoln College case. Hunt's case vouched. (1 Rol. Abr. 813.)

Some void *in præsentî*; as if one make a lease for so many years as he shall live, this is void *in præsentî* for the uncertainty, *et sic de similibus* (c 1).

Lease for so many years as lessor shall live, is void in præsentî.

(c 1) This distinction between void and voidable leases, is frequently material, for where a lease becomes absolutely void by the death of the lessor, no acceptance of rent, or any other act by the person in remainder or reversion, will make it good: whereas if a lease be voidable only, acceptance of rent will operate as a confirmation of it. 4 Cru. Dig. 131. Ante, 215 a. p. 88. n. (128). Leases by tenants in tail, not warranted by the statute, we have seen, are voidable by the issue in tail; and if such issue accept of rent or fealty from the lessee, after the death of their ancestor, or bring an action for rent or for waste, these acts will amount to a confirmation of the lease. But all leases by tenants in tail, whether pursuant to the statute or otherwise, are, on the death of the tenant in tail without issue, void as against the persons in remainder or reversion; so that no acceptance of rent by them will operate as a confirmation. Supra, 45 b. Leases by husband and wife of the wife's estate, not made according to the statute, are only voidable as to the wife, and therefore her acceptance of rent, after her husband's death, will amount to a confirmation. *Doe v. Weller*, 7 T. R. 478. But in the case of a lease by the husband alone, of lands of which he is seised in right of his wife, it seems doubtful, whether the lease is only voidable by the wife after her husband's death, or absolutely void. See 4 Bac. Abr. p. 18. tit. Leases (C). 2 Saund. 180. n. 9. All leases by tenants for life become absolutely void on their death. Supra, p. 130. n. (A 1). Et vid. *Jenkins v. Church*, Cowp. 482. *Doe v. Butcher*, Dougl. 50. *Goodright v. Humphrys*, cited Dougl. 52 n. *Roe, d. Jordan v. Ward*, 1 H. Bl. 97. And where tenant for life leased premises for twenty-one years, and before the expiration of that term died, the trustees of the remainder-man, then an infant, continued to receive the rent reserved, and he, on coming of age, sold the premises by auction; in the conditions of sale the premises were declared to be subject to the lease, and in the conveyance to the purchaser the lease was referred to as in the possession of the lessee; and in the covenant against incumbrances that lease was excepted; the purchaser mortgaged, and in the mortgage deeds the like notice was taken of the lease, and the mortgagees for some time received the rent reserved; it was held, that the lease expired with the interest of the tenant for life, and that the notice since taken of it did not operate as a new lease. *Doe, d. Potter v. Archer*, 1 Bos. & P. 531. And see ante, p. 88. n. (128). The court of chancery has, however, held, that where the remainder-man accepted rent, and suffered the tenant to make improvements, knowing the defect in the lease, he should execute a new lease to the tenant. *Stiles v. Cowper*, 3 Atk. 692. Where a lease contains a proviso, that upon non-payment of the rent, on a certain day, the lease shall become absolutely void; and the rent is not paid on the day, no acceptance of rent after will operate as a confirmation of the lease. Ante, 215 a. p. 88. 3 Co. 65 a. *Finch v. Throckmorton*, Cro. Eliz. 221. Pophr. 25. 53. But where the proviso is, that upon non-payment of the rent, &c. the lessor shall re-enter, and the lessor accepts rent after breach of the condition with notice thereof, it will operate as a waiver of the forfeiture, and a confirmation of the lease, *Goodright v. Davids*, Cowp. 803. Ante, p. 88. n. (128); though it is otherwise if the lessor was ignorant of such breach. *Pennant's case*, 3 Co. 64. Et vid. *Roe v. Harrison*, 2 T. R. 425. As to the distinctions between freehold leases and leases for years determinable on lives, see 2 Prest. Conv. 162.

Before the close of this chapter some observations seem necessary with respect to leases by virtue of powers for that purpose. As leases made by tenants for life determine on the death of the lessor, powers are usually inserted in settlements, enabling the tenants for life to grant leases which shall be good against the persons in the remainder or reversion. Powers of this kind are productive of great advantage, not only to the tenants for life, and the persons in remainder and reversion, but also to the public. For the encouragement of farmers to occupy stock, and improve the land, it is necessary they should have some per-

manent interest. Unless the owner of the estate for life was enabled to make a permanent lease, he could not enjoy, to the best advantage, during his own time; and they who come after must suffer, by the land being untenanted, out of repair, and in a bad condition. The plan of this power is for the mutual advantage of possessor and successor. The execution thereof is checked with many conditions, to guard the successor, that the annual revenue shall not be diminished, nor those in succession or remainder at all prejudiced in point of remedy, or other circumstances of full and ample enjoyment. 1 Burr. 120, 121. Sudg. Pow. 563, 564. Formerly a distinction used to be taken between a power to a stranger having a particular estate, and a power reserved by the owner of the fee, which latter it has been said is to receive a more liberal construction than the other. But Mr. Sugden observes, that this doctrine, which has so direct a tendency to introduce different decisions on the same words, seems to be completely exploded at the present day, although an opinion has prevailed that a power of leasing is to receive a more strict construction than any other power (see Fitz. 219. 3 Vin. Abr. 431.), and that equity cannot relieve against a defect in the execution of it. However, it appears that this relief is administered in proper cases (Sudg. Pow. 564.), and the books abound with authorities in favour of the liberal construction of this power. *Idem*, 564.

We will now consider the restrictions, which are usually annexed to leasing powers. 1st. With respect to the instrument by which the power is executed. It is generally required to be by a deed indented, sealed and delivered in the presence of two or more witnesses; and also that the tenant should execute a counterpart of the lease. 1 Burr. 125. Livery of seisin is not necessary on a freehold lease made under a power; because the lease takes effect from the deed by which the power is created; and the legal estate is transferred by the operation of the statute of Uses. 1 Ventr. 291. 2 Lev. 149. 2 Prest. Conv. 147.

2d. As to the lands to be demised.—Mr. Sugden observes, that it is seldom that any question on this head arises at the present day, except upon wills unskilfully penned: for the power usually introduced in modern settlements, is to lease all the hereditaments comprised in the deed at the best rent, and if the mansion-house, park, or any other part, is not intended to be leased, it is expressly excepted in the power. Sudg. Pow. 567. Where a power extends to lands usually letten, lands which have been twice or thrice letten, are within the power, 2 Rol. Abr. 261. pl. 11, 12. Vaugh. 33.; but lands which has only been once letten, is not, it is said, within the proviso, for *usus fit ex iteratis actibus*. 2 Rol. Abr. 262. pl. 13. Lands not demised for the space of twenty-one years previous to the making of a lease, under a power, are not considered as lands usually let. *Tristram v. Lady Basinglass*, Vaugh. 31. And see the case of *Foot v. Marriott*, 3 Vin. Abr. 429. pl. 9. in which it was decided, that land not demised within twenty years, was not subject to the power. It has not, however, been expressly determined within what period the land must have been demised. But Mr. Sugden observes, that the courts might probably incline to fix twenty years as the limit, by analogy to the enabling statute of 32 H. 8. c. 28. which in a similar case considered that as a reasonable period. Sudg. Pow. 569. The lettings to which this statute refers, we have seen, must be by some persons seised of an estate of inheritance, and not by tenant by the curtesy, dower, &c. Supra, 44 b. p. 420. Dy. 271 b. pl. 28. But the same doctrine is not applied to powers in private settlements, though a contrary opinion was formerly entertained. *Ibid*. With respect to the words *usually demised*, it has been determined that they embrace every species of demise;—at will, from year to year, or for years or lives, and whether granted by parol, or by deed, by copy of court-roll, covenant to stand seised, or any other instrument. Supra, 44 b. p. 420. *Baugh v. Haynes*, Cro. Jac. 76. S. C. 6 Co. 37. nom. *Dean and Chapter of Worcester's case*. S. C. Mo. 759. nom. *Banks v. Brown*. *Right v. Thomas*, 3 Burr. 1441. 1 Bl. Rep. 446. Sudg. Pow. 570. It is to be observed, that it is a principle, that a qualification, which goes in destruction of a power, will be dispensed with. And, therefore, it has been determined, that where a power of leasing is given generally, provided the ancient rents be reserved, lands, which were not before in lease, may be demised. See *Cumberford's case*, 2 Rol. Abr. 262. *Walker v. Wakeman*, 1 Ventr. 294. 2 Lev. 150. 3 Keb. 597. *Winter v. Loveday*, 1 Ld. Raym. 267. Com. 37. 12 Mod. 147. *Goodtitle v. Funacan*, Dougl. 565. But a power may be taken to be special, and not allowed to extend to all the property comprised in the deed wherein the power is given, if such appears to have been the intention of the parties. *Mountjoy's case*, 5 Co. 3 b. And see the case of *Bagot v. Oughton*, 8 Mod. 249. Fort. 332. where the power was to lease “all or any part of the premises, at such yearly rents or more as the same are now let at;” and it was held, that the mansion-house and the demesne lands which were never leased before, could not be demised under this power. 8 Mod. 249. Fort. 332. Et vid. Lord Mansfield's observations on this case in Dougl. 573, 574. So in *Pomeroy v. Portington*, 3 T. R. 665. where a man, by his will, devised his

estate in strict settlement, and gave a power to lease all, or any of the said manors, messuages, lands, tenements, and hereditaments, for lives or years, so as the usual rents were reserved; the tenant for life made a lease of tithes, which had never been let before, but had always been occupied by the possessor of the estate: it was determined that this lease was void, because it was not the intention of the parties that the power of leasing should extend to the tithes, they never having been leased before. Et vid. acc. *Doe v. Halcombe*, 7 T. R. 713. *Foot v. Marriott*, 3 Vin. Abr. 429. pl. 9. And see the late case of *Doe, d. Bartlett v. Rendle*, 3 Maul. & S. 90. in which the court observed, that where it can be collected from the nature of the property never before demised, or from the character of the parties to whom the power is given, as in the case before the court of trustees, who were not intended to have any beneficial interest for themselves, or from any other circumstances, that the power was not intended to go beyond what had before been demised, it will be confined to that property. 3 Maul. & S. 105—107. There are cases, however, in which parts of the estate never leased have, in favour of the supposed intention, been considered to be within powers, requiring the ancient or usual, or present rents to be reserved. See *Cumberford's case*; *Walker v. Wakeman*; *Winter v. Loveden*; and *Goodtitle v. Funacan*, cited supra. But in all these cases the intention of the parties is to govern; and that intention, to be fairly collected from the whole instrument, is the only guide to the true construction of the power. See *Sudg. Pow. 576. Doe, d. Bartlett v. Rendle*, supra.

3. As to the time when the lease is to commence, whether in possession or reversion:—A lease may be considered as reversionary in two senses: In the largest sense, that is said to be a lease in reversion which is to commence on a future day. In a more confined sense of the term, it signifies a lease to begin from the determination of a lease in being; and the usual construction of the term "lease in reversion" in powers, is a lease to commence after the end of a present interest in being, and not a lease to commence after a future day, 1 Comb. 38. *Per Holt. Cart. 14. 25. 2 East. 383.* In all well drawn powers of leasing, where it is intended that a lease in reversion may be granted, it is expressly declared so; and if a reversionary lease is not to be granted, it is expressly declared that the lease shall be made to take effect in possession, and not in reversion, or by way of future interest. But where the estate is in hand, a general power to lease for a certain number of years, without expressing the time when such leases are to commence, authorizes leases in possession only, and not in reversion or *in futuro*. *Countess of Sussex v. Wroth*, Cro. Eliz. 5. S. C. cited 6 Co. 33 a. nom. *Leaper v. Wroth. Shecomb v. Hawkin*, Cro. Car. 118. 1 Brownl. 1481. Yelv. 222. nom. *Slocumb v. Hawkins*. And even where the estate is in lease, if the power is expressly to lease *in possession*, a lease in reversion cannot be granted. *Opy v. Thomasius*, 1 Lev. 267. Raym. 132. 1 Keb. 778. 910. 1 Sid. 260. 2 Ld. Raym. 792. And it seems doubtful whether a lease in reversion would be supported under a general power, although the estate was in lease at the time of the settlement, unless there were some direct evidence of the intention of the parties, as in the case of *Coventry v. Coventry*, 1 Comb. 312. Where a power expressly enables a person to make leases, as well in possession as in reversion, a lease in reversion will then be good. *Whitlocke's case*, 8 Co. 67. And under a power to lease not exceeding a given number of years *from the time of making*, a lease in reversion may be granted. See *Harcourt v. Pole*, 1 And. 273. 2 Ld. Raym. 1000. *Sudg. Pow. 584.* But although a power enable a man to make leases in reversion, as well as in possession, yet he cannot make a lease in possession, and another lease in reversion of the same land; but his power to make leases in reversion, shall be confined to such land as was not then in possession. *Winter v. Loveday*, 1 Com. 36. *Per Holt.* And the very same expression, "lease in reversion," may have a different signification in the same conveyance: being applied to a lease for life, it shall be intended of a concurrent lease, or a lease of the reversion, viz. a lease of that land, which is at the same time under a demise, and then it is not to commence after the end of the demise, but has a present commencement, and is concurrent with the prior demise, and this construction is imperiously called for, as a lease for life cannot be made to commence at a future day (*Whitlock's case*, 8 Co. 69 b.): but being applied to a lease for years, it shall be intended of a lease which shall take its effect after the expiration or determination of a lease in being. 1 Comb. 39 b. *Per Holt.* With respect to concurrent leases, it is observable, that a chattel lease may be granted pending a prior subsisting one, provided it be within the limits of the power, and provided it give no beneficial interest during the continuance of the subsisting lease; but so long as there is a freehold lease *in esse*, a second freehold lease cannot be granted. The right of granting a second chattel lease was settled in *Read v. Nash*, 1 Leon. 148. and is recognized as law in *Goodtitle v. Funacan*, Dougl. 3d ed. 573; but a second freehold lease cannot be granted, because it must be to take effect *in futuro*, and a freehold cannot be conveyed unless it is to take effect *in presenti*.

2 Wils. 166. If a lease therefore be granted for lives, no further lease could be granted till that lease were determined; not a chattel lease, because the power does not admit of the same premises being under a chattel and a freehold lease at the same time; nor a freehold lease, because that would be to commence *in futuro*: whereas, if there were a chattel lease for ninety-nine years, determinable upon three lives, and one of those lives were to drop, a second chattel lease for a new life, in addition to the other two, might be granted during the continuance of the first. Whenever a life therefore dropped, there would be this essential difference between a freehold and a chattel lease, that, upon the former, no new life could be added, unless the termor would surrender the first lease; whereas, upon the latter, a new life might be added without any such surrender. In the one case, therefore, an important advantage would accrue to the reversioner or remainder-man, if the tenant for life and the person entitled to the first lease could not agree upon a surrender; in the latter, such advantage would be wholly lost. *Roe, d. Brune v. Prideaux*, 10 East. 184, 185. Sed vide Sugd. Pow. 600. It was formerly held, that a lease made to commence, from the day of the date thereof, was a lease in reversion; but this doctrine has been altered by the determination in the case of *Pugh v. Duke of Leeds*, in which it was held, that "from" might mean either inclusive or exclusive; and that the parties necessarily understood and used it in that sense, which made their deed effectual; and, therefore, that a lease "to hold from the day of the date," was a valid lease under a power to lease in possession only. Cowp. 714. Et vid. *Rex v. Inhabitants of Gamlingay*, 3 T. R. 513. *Ex parte Fallon*, 5 T. R. 283. *Dowling v. Foxall*, 1 Ball. & B. 193. Where a lease, which is dated back, and on the face of it appears to commence *in futuro*, was not in truth executed till at or after the time when it was expressed to commence, in such case, the lease is a valid execution of the power, and may be supported as a lease in possession: for a deed takes effect from its execution, and not from the date of it, and, therefore, if the time of the execution can be proved, the lease cannot be defeated, *Campbell v. Leach*, Ambl. 740. *Doe v. Day*, 10 East. 427. *Hall v. Cazenove*, 4 East. 477; and extrinsic evidence is admissible to show when the lease was actually executed. *Doe v. Robson*, 15 East. 32. Sugd. Pow. 589. In regard to leases in reversion, it has been decided, that where the lease is to take effect in possession, it will be good, although the estate is in the possession of tenants from year to year, or at will, provided they, at the time the lease is granted, receive directions to pay their rent to the lessee. *Goodtitle v. Funacan*, Dougl. 565. And it seems, that an actual lease under the power, if in fact given up at the time of the execution of the new lease, might be presumed to be surrendered in support of the new lease, and at least in a *bona fide* case where the lessee is in nature of a purchaser, equity would relieve against the want of a surrender. *Campbell v. Leach*, supra. And if the new lease be made to the person in possession under the old lease, it will, without any actual surrender, operate as a surrender in law of the old lease, and so no objection on this head will lie to the new lease. But where the second lease does not pass all the interest which it purports to grant, as if it be void because the best rent was not reserved, there it will not operate as a surrender of the prior term; nor is it material that the first lease is cancelled, for cancellation at this day will not amount to a surrender in law of a lease. *Roe v. Archbishop of Canterbury*, 6 East. 86. Sugd. Pow. 589—591.

4th. As to the duration of the lease:—The usual practice is to restrain tenants for life from making leases for a longer term than twenty-one years, except in those countries where lands are usually let for lives, and there the tenant for life is allowed to grant leases for one, two, or three lives. In *Whitlock's case* it was laid down and agreed to by the whole court, that under a power to make an estate for three lives, the donee cannot make a lease for ninety-nine years determinable upon three lives. But a distinction was taken between a power particularizing the species of lease to be granted, and a general power not specifying the kind of lease, but adding a restriction to limit the extent of the lease, as a power generally to make leases, with a proviso that they should not exceed three lives or twenty-one years; under which it was determined, that the donee might make a lease for ninety-nine years, determinable on three lives, because the power was absolute, and indefinite; and the proviso of correction is added, that the lease shall not exceed three lives or twenty-one years; which clause is negative, and qualifies the generality of the first proviso; and a lease for ninety-nine years, determinable on three lives, does not exceed three lives, although in truth it is not a lease for lives. 8 Co. 69 b. *Rattle v. Popham*, Stra. 992. Cunn. 102. Et vid. 2 Ves. 644. *Churchman v. Harvey*, Ambl. 335. *Roe v. Prideaux*, 10 East. 158. A power to grant leases for two or more lives, implies an authority to grant them during the life of the survivor. *Alsop v. Pine*, 3 Keb. 44. Et vid. *Doe v. Hardwicke*, 10 East. 549. And under a power to make leases for three lives, a lease to one for three lives, or to three persons for their three lives, will be equally good.

See *Baugh v. Haynes*, Cro. Jac. 76. Sugd. Pow. 602. But the lease must be made for lives in case, Raym. 263.; and the lives must be concurrent, although the power is to demise "for one, two, or three lives," which seems to import succession. *Doe v. Halcombe*, 7 T. R. 713. A power to make leases, provided they do not exceed, thirty-one years, or three lives, will warrant a lease for three lives or thirty-one years, whichever shall last longest. *Commons v. Marshall*, 7 Bro. P. C. 111. Before closing this head, it may be observed, that where a power authorizes leases for any given term, as for any term of years not exceeding twenty-one years, a lease may be made for a term certain, with a proviso determining it on a given event, at the option of the lessor, *Earl of Cardigan v. Montague*, supra; but it would be otherwise if the power, as is sometimes the case, requires the lease to be for a term absolute. Sugd. Pow. 593. So if the power be to lease for any given term, as for twenty-one years, without saying for any term not exceeding the number of years, yet a lease may be made for a less term. *Isherwood v. Oldknow*, 3 Maul. & S. 382.

5th. As to the rent:—Where a settled estate has been usually let on lives, which is generally the case in Ireland, the common power of leasing is upon fines, which, as the lives or lease drop, are considered among the annual profits. 1 Burr. 121. But this practice prevails only in a few counties in England, and the power of leasing commonly introduced into settlements of estates in this country, requires the best rent to be reserved, and expressly prohibits the taking of a fine. Whether the best rent is reserved, is a question to be decided by a jury. Sugd. Pow. 603. Et vid. *Roe v. Archbishop of York*, 6 East. 86. *Doe v. Lloyd*, 3 Esp. Rep. 78. If the best rent is reserved, the tenant agreeing to lay out money in improvements is not material. See *Shannon v. Bradstreet*, 1 Rep. T. Redesdale, 52. *Campbell v. Leach*, supra. *Doe v. Bettison*, 12 East. 305. But, it seems, that although the rent reserved be the full value of the land, yet if satisfactory evidence could be produced to a jury, that a tenant was willing to give an additional rent in lieu of the money agreed to be laid out in improvements, the lease could not be supported. *Wright v. Smith*, 5 Esp. 203. It is not, however, sufficient to impeach a *bona fide* lease without a fine, at a rent which the jury find a fair rent, that the tenant for life had offers of higher rents from other persons whose responsibility could not be disproved: for in the exercise of such a power where fairly intended, and no fine or other collateral consideration is taken by the tenant for life leasing under the power, or injurious partiality manifestly shown by him, in favour of the particular lessee, there ought to be something extravagantly wrong in the bargain to set it aside on this ground; for in the choice of a tenant there are many things to be regarded besides the mere amount of the rent offered. *Doe, d. Lawton v. Radcliffe*, 10 East. 278. Where from the quantity and nature of the property demised it cannot be ascertained whether the best rent is reserved, the lease will be void. Sugd. Pow. 605. *Earl of Cardigan v. Montague*, Ibid. App. No. 9. (2). Formerly powers of leasing required the ancient or usual rent to be reserved, but at the present day, we have seen, this practice is exploded. Where, however, such a term is introduced, the better opinion is, that as a general rule, the rent reserved at the time of the creation of the power, where a lease was then in being, or last before it, where no lease was then in being, is the rent to which the power must be taken to refer. Sugd. Pow. 607. But it is no objection that more than the ancient rent is reserved (3 Ch. Ca. 78. Et vid. *Doe, d. Newnham v. Creed*, 4 Maul. & S. 371.), nor that heriots or other casual and accidental services, which have been usually rendered, are not reserved by the lease under the power. *Baugh v. Haynes*, Cro. Jac. 76. Mo. 759. Supra, 44 b. p. 420. *Coventry v. Coventry*, 1 Comb. 312. But if the taxes were formerly paid by the tenant, a reservation of the ancient rent, without a covenant by the lessee to pay the taxes, will not be good. *Earl of Cardigan v. Montague*, Sugd. App. No. 9. (8). *Goodtitle v. Funacan*, Dougl. 565. But where a power, requiring the best rent, also required that no power should be given to any lessee to commit waste, and that the lease should contain usual covenants, it was held that a lease was good, though the lessor covenanted to do part of the repairs, and in case of neglect the tenant was authorized to do them, and deduct the expense out of the rent; and though the lessor covenanted, in consideration of a large sum to be laid out by the lessee in the repair of the premises in the first instance, to renew during his (the lessor's) life, at the request of the lessee, his executors, &c. on the same terms; because this covenant only bound the lessor himself, and if the best rent were not reserved upon such renewal, the lease would be void against the remainder-man. *Doe, d. Bromley v. Bettison*, 12 East. 305. Where a power was given by will to a tenant for life to make leases of lands for not exceeding sixty-one years, at the usual or other the most rents; it was held, that he might well lease the lands upon a fine, and at a reserved rent, which rent exceeded the rent reserved upon a former lease in being at the date of the will, and at the testator's death, and upon which lease the then lessor

had also taken a fine. *Doc, d. Neunham v. Creed*, 4 Maul. & S. 371. It may be further observed, that the word "rent" in powers of leasing is construed to mean produce as well as money. *Campbell v. Leach*, Ambl. 740. *Bassett's case*, cited *ibid.* 748. With respect to the form of the reservation, it is observable, that where the ancient or usual rent is required, the rent must be reserved as formerly; as where gold has been usually reserved, silver cannot be made payable in lieu of it; or if it were commonly paid at four days, a reservation at one, two, or three days, would be void, unless the power require the yearly accustomed rent to be reserved; in which case, the whole rent may be made payable at one time, or at several periods, 6 Co. 38 a. *Campbell v. Leach*, supra. *Earl of Cardigan v. Montague*, Sugd. Pow. App. No. 9.; but a difference of words is not material; therefore a reservation of eight bushels of grain, in lieu of a quarter, is good, because it is all one in quality, value, and nature. *Mountjoy's case*, 6 Co. 3 b. 3 Ch. Rep. 75. 1 Burr. 121. It has been considered, that two several farms not usually let together could not be joined in one demise, with a reservation of one and the same rent, nor a *parcel* of a farm rendering rent *pro rata*, 5 Co. 5 b. 3 Ch. Rep. 75. *Smith v. Trinder*, Cro. Car. 22. But however that may be, it is clear, that the mere circumstance of the rent being reserved out of the land, and recent improvements on it by building, will not vitiate the lease, although, as it has been argued, part of the rent issues out of the buildings. *Reed v. Nash*, 1 Leon. 147. Sugd. Pow. 610, 611. The rent to be paid should, in strictness, be specified in the lease; but although the reservation be made in the very words of the power, without stating the sum in particular, it will be sufficient if it have reference to some standard by which the rent can be ascertained with certainty, *Lewson v. Pigot*, 3 Ch. Rep. 61. et vid. *Audley v. Audley*, 2 Ch. Rep. 82. *Shannon v. Bradstreet*, 1 Rep. T. Redesdale, 52.: but if the reservation be vague and indefinite, and not easily reducible to a certainty, the lease will be void. Sugd. Pow. 611, 612. Therefore a reservation in the words of the power, as the *best improved rent*, or, *the ancient and accustomed rents*, will be invalid. See *Arby v. Mohun*, 2 Vern. 531. 542. Prec. Ch. 257. 2 Freem. 291. 3 Ch. Rep. 56. *Ker v. Duke of Roxberghe*, 2 Dow. 189. Where the rent is required to be reserved at particular days, it must be reserved accordingly; but where merely the best yearly rent is required to be reserved, it may be made payable quarterly, or half yearly. *Campbell v. Leach*, Ambl. 740. 6 Co. 38 a. *Earl of Cardigan v. Montague*, supra. It seems clear that the rent cannot be reserved *after* the day appointed (*Ludlow v. Beckwith*, Al. 90.), nor, as it should seem, before the day, as that would have a tendency to benefit the tenant for life, at the expense of the remainder-man. Sugd. Pow. 615. With respect to rent reserved for lands within the power, and for lands not within the power, Mr. Sugden observes, that the cases seem to establish this principle: where an entire gross sum is reserved generally, and part of the lands are not comprised in the power, or being comprised in the power, are not duly demised, the power is badly executed, although the rent upon an apportionment would be sufficient for both estates. See *How v. Whitfield*, 1 Ventr. 339. 2 Jo. 110. 2 Show. 67. *Earl of Cardigan v. Montague*, supra. But where a rent is reserved according to the quantity, or produce, as the tenth of the produce of every mine, or 40s. an acre, or the like, there, although the demise is joint in terms, and part is not well demised, or not comprised in the power, yet it shall hold good as to the lands comprised in the power, and duly demised. See *Campbell v. Leach*, 3 Ch. Rep. 68, 69. Sugd. Pow. 619, 620. Where there is a distinct reservation of a particular sum in respect of the lands comprised in the power, that constitutes a several demise, and no objection can be raised to the execution of the power. *Ibid.* 621. *Knight's case*, 5 Co. 54 b. And see the late case of *Doc, d. Bartlett v. Rendle*, where under a devise of lands to trustees and their heirs, in trust to the use of W. B. B. and his first and other sons in strict settlement, remainder to I. B. and his first and other sons in strict settlement, with power to the trustees from time to time during the minorities of the persons to whom the premises should descend, and to any tenant for life, to grant any lease of *all or any part of the lands so limited*, so no there be reserved the ancient and accustomed yearly rent, &c.: it was held, that a lease by W. B. B. of part of the lands devised, in several parcels, in one of which parcels were included, together with lands anciently demised, two closes never before demised, at one entire rent, viz. the ancient rent, for that part which had been anciently demised, was void, for the whole of the lands included in that parcel, as well the lands never before let as those anciently let: but it seems to be good as to the other parcels, which contained only lands anciently demised, and on each of which there was a several reservation of the ancient rent. 3 Maul. & S. 99. It is also observable, that where lands of which the lessor was seized in fee, and also lands over which he had a power of leasing, are comprised in one lease at an entire rent, though the lease, after the death of the lessor, will be void as to the lands subject to the power, yet it will remain good as to the lands in fee; for the rent may be apportioned. See *Doe, d. Vaughan v. Meyler*, 2 Maul. & S. 276. With respect to

the persons to whom the rent should be reserved, it is usual, in powers of leasing, to express that the rent reserved shall be incident to, and go along with the reversion and inheritance of the estate demised, and in well-drawn leases under powers, the rent is accordingly reserved to the tenant for life, and after his decease to the person or persons who shall, for the time being, be entitled to the reversion and inheritance of the premises under the instrument creating the power. Sugd. Pow. 621. But a reservation to the tenant for life, exercising the power, "his heirs and assigns," is a good reservation, for those words mean of necessity the person to whom the inheritance shall go. *Whitlock's case*, 8 Co. 69 b. *Holley v. Scott*, Loft. 316. Dougl. 572. *Campbell v. Leach*, supra. So a reservation of rent generally during the term, without saying to whom, will be good and effectual in law; and in *Whitlock's case* it was agreed, that this was the most clear and sure way, and the law will make the distribution. Sugd. Pow. 621. But it is observable, that under a power to lease, rendering such rent as the donee shall think fit, no rent whatever need be reserved. *Talbot v. Tipper*, Skin. 427.

6th. As to the clauses and covenants:—In powers of leasing, besides the reservation of the best rent, it is usually required that the lessee covenant for payment of the rent (see 1 Burr. 125), that a clause be inserted for re-entry in default of payment (see *Holley v. Scott*, Loft. 316. *Rees v. King*. For. Excheq. Rep. 19. *Coxe v. Day*, 13 East, 118. *Doe, d. Vaughan v. Meyler*, 2 Maul. & S. 276.), that the lessee be not made punishable of waste (*Campbell v. Leach*, Amb. 740.), and that he execute a counterpart of the lease; and if any of these conditions be not complied with, the lease will be void. Sugd. Pow. 623. And it seems, that the circumstances usually made requisite in powers of leasing, must be considered as implied, although not expressly required. *Taylor v. Horde*, 1 Burr. 125. Where however, the power does not require any particular covenants, a lease under the power will be valid, though it does not contain the same covenants as were inserted in the former leases, if they are upon the whole equally beneficial as the former. *Goodtitle v. Funacan*, Dougl. 565. *Earl of Cardigan v. Montague*, supra. It may be further observed, that where a power expressly requires the lease to contain usual, or usual and reasonable covenants, or the like, unless the covenants contained in the former leases are inserted in the new leases, they cannot be sustained. See *Earl of Cardigan v. Montague*, supra. 8 Ch. Rep. 76. *Jones v. Verney*, Willes, 169. *Doe v. Sandham*, 1 T. R. 705. 12 East, 309. And the construction is the same upon any word tantamount to the word covenants, as "boons," or the like. *Earl of Cardigan v. Montague*, supra. It is also to be observed, that the covenants entered into by the lessee with the donee of the power, his heirs and assigns, will, under the 32 H. 8. c. 34. enure to the remainder-man, who may maintain an action on them. Sugd. Pow. 630. *Isherwood v. Oldknow*, 3 Maul. & S. 382.

It remains to observe, that where the terms of the power are complied with, it is no objection that the lease is granted in trust for the lessor himself, for that is a question merely between the parties. *Wilson v. Sewell*, 1 Bl. Rep. 61. *Earl of Cardigan v. Montague*, supra. *Taylor v. Horde*, 1 Burr. 60. But where a tenant for life makes a lease not warranted by his power, it is absolutely void, as to the person in remainder or reversion, and not merely voidable: and, therefore, no acceptance of rent by the remainder-man can set it up. *Jones v. Verney*, supra. *Doe v. Watts*, 7 T. R. 83. The acceptance of rent, however, as rent, may operate as an admission by the remainder-man that the lessee is his tenant, and in that case he will be entitled to notice to quit. And, under some circumstances, equity would compel the remainder-man to grant a new lease. See *Roe v. Prideaux*, 10 East. 158. Ant. p. 88. n. (128).

With respect to equitable relief in the case of a defective execution of a power to lease, it is clear that in the construction of powers originally in their nature legal, courts of equity must follow the law, be the consideration ever so meritorious; for instance, powers to a tenant in tail to make leases under the statute, if not executed in the requisite form, no consideration ever so meritorious will avail. So with respect to powers under the civil list act, powers under particular family entails, as in the case of the Duke of Bolton, &c. equity can no more relieve from defects in them, than it can from defects in a common recovery. Per Lord Mansfield, Cowp. 267. Et vid. acc. *Anon.* 2 Freem. 224. But the material question to be considered is, whether equity can relieve against a defective execution of the usual power of leasing in settlements. As to which Mr. Sugden observes, that the rule seems to be this: that where there is no fraud on the remainder-man, as where the former lease is abandoned, although not actually surrendered, or there is merely a defect in the mode of the execution of the power; for example, only one witness where two were required, or a seal be wanting, or the like: in all these cases it should seem that if the lessee is in the nature of a purchaser, equity will relieve against the defective execution of a power, see *Shannon v. Bradstreet*, 1 Sch. & Lef. 52. *Doe v. Weller*, 7 T. R. 478. Willes,

176. 13 Ves. 576; but where the best rent is not reserved, or a fine is paid contrary to the terms of the power, or the lease substantially commences *in futuro*, or the interest of the remainder-man is, in other respects, invaded, as in the cases of *Temple v. Balinglass* (Finch. 275.), *Doe v. Sandham* (1 T. R. 705.), and *Sandham v. Medwin* (Excheq. 2d March, 1789), there it seems clear that equity cannot relieve. Sugd. Pow. 567, 568. *Stratford v. Lord Aldborough*, 1 Rigdw. P. C. 231. *Campbell v. Leach*, Ambl. 740. Sugd. Pow. App. No. 13: nor in these cases can any line be well drawn as to the quantum of excess or defect in the execution of the power. Therefore a lease to commence the day after the date of the deed, would be equally bad with a lease to commence at fifty years from the date. Sugd. Pow. 368. With regard, however, to the effect of an excessive execution of a power of leasing, it is observable, that where there is a complete execution, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, and the boundaries between the excess and execution are not distinguishable, it will be bad. *Per* Sir Thomas Clarke, 2 Ves. 644. Et vid. 13 Ves. 576. Thus, if a man having a power to lease for twenty-one years lease for forty, that will be good in equity *pro tanto*, because it is a complete execution of the power, and it appears how much he has exceeded it, *ibid.* et vid. *Parry v. Brown*, 2 Freem. 171. 3 Ch. Rep. 610. Nels. Ch. Rep. 87. *Anon.* 2 Freem. 224. Barnard. 116. *Campbell v. Leach*, *supra*: though the excess would render the lease void at law, *Campbell v. Leach*, *supra*. *Roe v. Prideaux*, 10 East. 158. Where, however, a *distinct* limitation is superadded, it will be merely void, and will not affect a prior valid appointment, even at law; as if under a power to lease for twenty-one years, a lease be accordingly made for twenty-one years, and by the same deed, the donee limit a further term in this manner, viz. *and from and after the term aforesaid for one year more*, the power will be well executed by the first limitation, and the excess will be surplusage not to be regarded. Fitzg. 157. 2 Sch. & Lef. 332. *Commons v. Marshall*, 7 Bro. P. C. 111. Sugd. Pow. 546. Where a tenant for life, with power of leasing, grants a lease for a term absolute, without referring to or mentioning his power, as the lease, if it be supplied out of his interest, would expire with his life, it shall, therefore, operate as an execution of the power. *Campbell v. Leach*, *supra*, et vid. 10 Mod. 36: though, if a lease comprise fee-simple estates as well as estates subject to the power, it seems a nice question, whether the deed shall enure by fractions, so as to be a lease out of the interest as to the fee-simple lands, and an appointment as to the rest. See *Bibell v. Drinkhouse*, Mo. 645. Sugd. Pow. 290, 291. On the other hand, if a tenant for life, with a power of leasing, refers to his power, and in execution of it grant a lease to a person having an existing valid lease, although the power prove to be badly executed, yet the new lease shall not, as between the lessee and the remainder-man, be construed to have enured out of the estate for life of the lessor, because under that construction, the existing valid lease would be merged by a surrender in law, to the prejudice of the lessee. *Roe, d. Earl of Berkeley v. Archbishop of York*, 6 East. 86.

With respect to agreements to execute a lease:—In the case of *Harnett v. Yielding*, where a man, with a power of leasing for twenty-one years at rack-rent, agreed to execute a lease for twenty-one years, and a further lease for twenty-one years at any time during his life, consequently to execute a lease for twenty-one years, whatever might be the increased value of the property at the time of the lease granted; Lord Redesdale considered this to be an agreement to act in fraud of the power, and held that the purchaser was not entitled to a specific performance even *pro tanto*. 2 Sch. & Lef. 549. But Mr. Sugden observes, that it seems open to contend, that if the lessee is willing to take such a lease as the party can grant without risk to himself or injury to the remainder-man, equity must specifically perform the agreement *pro tanto*. Sugd. Pow. 347. Treat. Purch. 4th edit. 177. 241. But where the party cannot grant the lease required so as to bind the inheritance, the court will not decree a specific performance, by directing an invalid lease to be executed, which might incumber and embarrass those entitled to estates in remainder. *Ellard v. Lord Llandaff*, 1 Ball. & B. 241. *O'Rourke v. Percival*, 2 Ball. & B. 58. And generally, where a man, after entering into a contract for a lease, commits a felony, equity will not enforce the agreement. See *Willingham v. Joyce*, 3 Ves. 168. So, if the tenant has treated the land in an unhusbandlike manner, and has been guilty of various breaches of covenant, for which the lessor had a right of re-entry, the court will not decree a specific performance in his favour. *Hill v. Barclay*, 18 Ves. 63. Insolvency also, admitted and not cleared away, is a weighty objection to a specific performance of an agreement for a lease. *Buckland v. Hall*, 8 Ves. 95. *O'Herlihy v. Hedges*, 1 Sch. & Lef. 130. And it seems that the assignee of a bankrupt cannot compel a landlord specifically to perform an agreement to grant a lease to the bankrupt. See *Weatherall v. Geering*, 12 Ves. 514. *Franklin v. Lord Brownlow*,

CHAP. XXXIX.*

SAME SUBJECT. .

OF EXCHANGE.

Of what things an exchange (A) may be made (which was a conveyance frequent in former times) is to be seen: and herein many things are to be observed.

First, that the things exchanged (a) need not to be *in esse* at the time of the exchange made. As if I grant a rent newly created out of my lands in exchange for the manor of Dale, this is a good exchange (1).

Secondly, (b) there needeth no transmutation of possession, and therefore a release of a rent, or estovers, or right to land, in exchange for land, is good (2).

The things (c) exchanged need not be of one nature, so they concern lands or tenements, whereof Littleton here speaketh. As land for rent or common, or any other inheritance which concern lands or tenements, or spiritual things, as tithes, &c. for temporal, and tenure by a divine service for a temporal seignory, &c. But annuities or such like *which charge the person only, and do not concern lands or tenements, cannot be exchanged for lands or tenements (B).

(1) But in one of the books cited by Lord Coke, the opinion is, that both of the things exchanged ought to be *in esse* at the time of the exchange. See 9 E. 4. 21.—[Hargr. n. 4. 50 b. (327).]

(2) See as to this Fulb. Paral. 33 a. in the dialogue on exchanges.—[Hargr. n. 5. 50 b.]

14 Ves. 550. And it is also observable, that a lease will, in equity, be set aside, where it has been obtained by surprise or fraud, provided there has been no laches. See *Smyth v. Smyth*, 2 Mad. Rep. 75. But though on a bill for the *specific performance* of a contract, the court has often taken great latitude in refusing it; yet when a party, under no distress or incompetency, makes a contract, it must be a very strong case, to induce a court to rescind it. Ib. 89.—[Ed.]

(A) An exchange is defined to be, a mutual grant of equal interests, the one in consideration of the other. 2 Bl. Com. 323. As where a man is seised or possessed of land in fee simple, fee-tail, for life, or years, and another is, in like manner, seised or possessed of other lands, and they do exchange their lands, the one for the other. And in this there is a double grant; for each of them grants that which is his, to the other. *Infra*, 50 b. It appears here, and from the many precedents of deeds of exchange inserted in Mr. Madox's *Formulare*, that this mode of conveyance was formerly much in use, though it is not now so frequent. The circumstances requisite to an exchange, and its effect and operation, will be considered in the course of this chapter.—[Ed.]

(B) See acc. 1 Wood, 740. Lilly's *Conv.* 138. 4 Com. Dig. 104. Exchange (A 1) Vin. Abr. Exchange (D). Shep. Touch. c. 16. p. 293, 294.

With respect to the persons who may exchange:—All persons who are capable of conveying away their lands, may, of course, exchange them for others; and if an infant exchanges lands, and enters on those acquired by the exchange, and continues to hold them after he attains his full age, the exchange is become perfect, for it was not originally void,

(443)*

50 b.

1. Of what things an exchange may be made. (Hob. 41.)

The things exchanged need not be *in esse* at the time of exchange.

(a) 30 E. 1. Each. 15. 3 E. 4. 10. 9 E. 4. 21. 14 H. 3. 20. (Fort. 366 a.)

Transmutation of possession not requisite to an exchange. (1 Rol. Abr. 812.)

(b) 6 E. 56. 30 E. 1. Each. 2. 7 H. 4. 34. 3 E. 4. 11.

The things need not be of the same nature, so as they concern lands or tenements. (c) 9 E. 4. 21. 9 E. 3. 56. 21 E. 3. 6. (444)*

LITTLETON.
[Sect. 64.
50 b.]

2. Circumstances requisite to an exchange. The estates reciprocally given in exchange must be equal in quantity.

51 b.

AND note, that in exchanges it behoveth, that the estates which both parties have in the lands so exchanged, be equal; for if the one willeth and grant that the other shall have his land in fee-tail for the land which he hath of the grant of the other in fee-simple, although that the other agree to this, yet this exchange is void, because the estates be not equal.

"Although that the other agree to this, yet this exchange is void." The agreement of the parties cannot make that good which the law maketh void?

LITTLETON.
[Sect. 65.
50 b.]

But it is not necessary that there should be equality in value;

IN the same manner it is, where it is granted and agreed between them, that the one shall have in the one land fee-tail, and the other in the other land but for term of life; or if the one shall have in the one land fee-tail general, and the other in the other land fee-tail special, &c. So always it behoveth that in exchange the estates of both parties be equal, viz. if the one hath a fee-simple in the one land, that the other shall have like estate in the other land; and if the one hath fee-tail in the one land, the other ought to have the like estate in the other land, &c. and so of other estates. But it is nothing to charge of the equal value of the lands; for albeit that the land of the one be of a far greater value than the land of the other, this is nothing to the purpose, so as the estates made by the exchange be equal. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c. and in each of these grants mention shall be made of the exchange.

50 b.

Estates.
Vid. sect. 630.

(445)*

*51 a.
nor equality
in quantity.

"In exchanges it behoveth, that the estates be equal, &c." Equality in lands is threefold, viz. First, equality in value. **Secondly, equality in quantity of estate given and taken. Thirdly, equality in quality or manner of the estate given and taken. But, as Littleton saith, equality in value of lands in exchange is not requisite; neither equality in the quality or manner of the estate. And therefore if two joint-tenants give lands jointly to two men and their heirs, and the other in exchange of other lands to them and their heirs in common, this is a good exchange (3); and yet the manner of their estates is not equal, for the estate of one party is joint, and the other in common. And so it is if two men give lands in exchange to A. and his heirs for lands from A. to them two and their heirs, though the one party have a joint estate, and the other a sole estate, yet the exchange is good. The like is, if the one land

(3) Here four persons are named as parties to an exchange. But this is not irreconcilable with the opinion mentioned in note 1. of fol. 50 b. that an exchange cannot be between more than two distinct parties; because though four persons are named, yet

they constitute only two distinct parties; for in point of interest the two joint-tenants are the conveying parties on the one side, and the two tenants in common are the conveying parties on the other, and consequently there is the same reciprocity as if the transaction

because the entry was equivalent to delivery, and also in respect of the recompense, but only voidable. 4 Cru. Dig. 144, 145. Infra, 51 b. But coparceners, joint-tenants, or tenants in common, cannot exchange with each other, before partition, their possession being till then undivided. Shep. Touch. 292. Ante, vol. 1. p. 718. n. (a).—[Ed.]

be of a defeasible title, and the other of an indefeasible title, yet the exchange is good till it be avoided.

(d) An exchange with the king is good, and yet the king is seised in his politic capacity, and the subject in his natural capacity (4). But equality of the quantity of the estate is requisite, as it appeareth clearly in the cases put by Littleton. (e) But therein it is to be observed, that it is not necessary that the parties to the exchange be seised of an equal estate at the time of the exchange made: for if tenant in tail, or a husband seised in the right of his wife, exchange lands, and both by the exchange give a fee-simple, this is good until it be avoided by the issue in tail, or by the wife after the death of her husband; (f) so as Littleton saith, that in exchanges it behoveth that the estates which both parties have in the land so exchanged be equal, is as much as to say, that the state reciprocally given in exchange ought to be equal. (g) But in a partition the estates allotted *to either party need not to be *equal, as shall be observed in his proper place.

To shut up this point, there be five things necessary to the perfection of an exchange.

1. That the estate given be equal (6).

2. That this word (*excambium*, exchange) be used, (h) which is so individually requisite, as it cannot be supplied by any other word, or described by any circumlocution (7): and herewith agreeth Littleton in this section. In the book of Domesday I find, *Hanc terram cambiavit Hugo Briccuno quod modò tenet comes Meriton, et ipsum scambium valet duplum.*

Hugo de Belcamp pro escambio de Warres.

3. That there be an execution by entry or claim in the life of the parties (c).

(i) 4. That if it be of things that lie in grant, it must be by deed.

was between two persons only. The same observation applies to any number of persons, if so conjoined in the mutuality of giving and receiving in exchange, as to make only two distinct relative parts.—[Hargr. n. 1. 51 a. (328).]

[See infra, n. (8).]—[Ed.]

(4) See 2 Inst. 269.—But if the king makes exchange, it seems that it should be by writing recorded; because he can neither give nor take land without matter of record. See Lane, 31. 60. Vin. Abr. Z. c. A. d. B. d.—[Hargr. n. 2. 51 a. (229).]

(c) See infra, n. (r).—[Ed.]

(d) Bracton, lib. 5. fol. 338.
17 E. 3. 12 b.
4 H. 4. 2.
(e) 14 H. 6.
6 E. 2. Exch.
12 8 E. 2.
Eui in vita,
28. 10 E. 2.
Exch. 13. 16
E. 3. Exch. 2.
3 E. 3. 19. 12
H. 4. 12. 21
H. 6. 25. 13
E. 4. 3. (5)
(1 Rol. Abr.
811. 4 Co. 121.)
(f) 44 E. 3.
20. 38 E. 3. 15.
39 E. 3. 1.
9 E. 4. 21.
7 H. 4. 17.
30 E. 1. tit.
Bre. 884. 30
E. 1. tit. Ex-
change 15.
(g) F. N. B.
62 m.
(Ante, 172 b.)
(446)*
*51 b.
The word ex-
change is re-
quisite.
(h) 9 E. 4. 21.
25 H. 6. 56.
19 H. 6. 27.
44 E. 3. 24.
50 Ass. Dor-
set. Wadon.
Bedf. San-
deia. 9 E. 4.
39. 15 E. 4. 3.
45 E. 3. 30.
(4 Co. 121.)
45 E. 3. Ex-
change 1.
Execution
must be had
by entry or
claim in the
life of the
parties.
The ex-
change must
be by deed, in
the case of
things lying
in grant;
(i) 28 H. 6. 2.
or where the
lands lie in
several coun-
ties.

(5) "45 E. 3. 20." Hal. MSS.—[Hargr. n. 3. 51 a.]

(6) "Vid. 22 E. 3. 3. Contra 38 E. 3. 15." Hal. MSS.—[Hargr. n. 1. 51 b.]

(7) See ante, 50 b. n. 1. and 3. and the case of Eton College there cited. In that case one reason given, why an act of parliament was not suffered to operate as an exchange, was the want of that word in the act.—[Hargr. n. 2. 51 b. (330).]

(k) 45 E. 3. 20.
7 H. 4. 11.

(k) 5. If the lands be in several counties, there ought to be a deed indented, or if the thing lie in grant albeit they be in one county (v).

LITTLETON.
[Sect. 62.
50 a.]

But livery of
seisin is not
necessary to
an exchange:

*50 b.

(447)*

*AND in some case a man shall have by the grant of another a fee-simple, fee-tail, or freehold, without livery of seisin. As if there be two men, and each of them is seised of one quantity of land in one county, and the one granteth his land to the other in exchange for the land which the other hath, and in like manner the other granteth *his land to the *first grantor, in exchange for the land which the first grantor hath; in this case each may enter into the other's land, so put in exchange, without any livery of seisin (8): and such exchange made by parol of tenements within the same county, without writing, is good enough (9).*

50 a.

(4 Co. 121.)
45 E. 3. 21.
3 E. 4. 10.
9 E. 4. 21.
7 H. 4. 1.
8 H. 7. 4.
28 H. 6. 2.

Vol. sect. 1.

*50 b.

Here Littleton putteth a case where freehold, &c. shall pass without livery of seisin, and thereupon putteth the case of an exchange of lands in one county, that is good by deed or without deed (x), without any livery, but if it be in several counties there must be a deed. Also of things that lie in grant, as advowsons, rents, commons, &c. an exchange of them, albeit they be in one county, is not good, unless it be by deed; and therefore Littleton putteth his case warily of land. And in case of a fine which is a feoffment of record, of a devise by a last will, of a surrender, of a release or confirmation to a *lessee for years, or at will: in all these and some other cases, a freehold, &c. (as hath been said) may pass without livery. But this word (*exchange*) which our author here useth, is so appropriated by law to this case, as it cannot be expressed by any periphrasis or circumlocution (10).

(8) It is observable, that Littleton expresses himself concerning an exchange as of a transaction between *two*; and in a late case the court held, that an exchange in the strict legal sense of the word cannot be between *three*, the principles of it not being applicable to more than two *distinct* contracting parties, for want of the mutuality and reciprocity on which its operation so entirely depends. For, 1, The consideration of an exchange and of the implied warranty incident to it is the receiving something with warranty from the *same* person, to whom something with warranty is given; but if there could be *three* distinct parties, each would give to one and receive from another. 2. The implied condition of re-entry is, that re-entry may be made on him whose title fails; but if there could be three parties to an exchange, then each person would be liable to re-entry for the fault of another's title as well as of his own. See the case of *Eton*

College, in Wilson, v. 2. part 3. page 483. and n. 1. in 51 a. (supra, p. 445. n. 3.) and n. 2. in 51 b. (supra, p. 446. n. 7.)—[Hargr. n. 1. 50 b. (325).]

[See the above case of *Eton College*, in 3 Wils. 3d ed. 483. in which it was decided, that an exchange can only be between two parties; and therefore if three mutually grant reciprocal estates to each other, viz. A. to C., B. to A., and C. to B., and A. be evicted of the tenements granted to him by B., A. cannot recover of C. the tenements granted to him.]—[*Ed.*]

(9) But now by force of the statute of 29 C. 2. c. 3. a writing is necessary, if the exchange is of freeholds, or of terms for years, being for more than three years.—[Hargr. n. 2. 51 b. (326).]

(10) See acc. ante, 51 b. p. 446. and Wils. vol. 2. part 3. page 491. 496.—[Hargr. n. 3. 50 b.]

(d) And now by the 29 Cha. 2. c. 3. a writing is necessary in all cases, where the exchange is of freeholds or of terms for years, exceeding three years.—[*Ed.*]

(e) See n. (9) supra.—[*Ed.*]

*“*In this case each may enter, &c.*” For by the exchange the parties, albeit the lands be all in one county, have no freehold in deed or law in them before they execute the same by entry; and therefore if one of them dieth before the exchange be executed by entry, the exchange is void (r); for the heir cannot enter and take it as a purchaser, because he was named only to take by way of limitation of estate in course of descent. (448)*

though entry must be made.

9 E. 4. 38, 39.
36 E. 3. 20, 21.
45 E. 3. 3. Exchange 10.

AND if the lands or tenements be in divers counties, viz. that which the one hath in one county, and that which the other hath in another county, there it behoveth to have a deed indented made between them of this exchange. LITTLETON. [Sect. 63. 50 b.]

This is evident enough.

(l) If an infant exchange lands, and after his full age occupy the lands taken in exchange, the exchange is become perfect, for the exchange at the first was not void (because it amounted to a livery, and also in respect of the recompense), but voidable (11) (g).

50 b.
51 b.
Exchange by an infant is voidable only.
(d) 4 E. 2. ut. Exch. 10.
12 H. 4. 12.
On an exchange warranty is implied.

(11) See ante, vol. 1. p. 177. n. (41).

(r) If both parties die before entry the exchange will be void, for it must be executed in the same parties that made the exchange, Bro. Abr. Exchange. pl. 6. Vin. Abr. Exchange (K); and if one die, his heir may avoid it: but if one of the parties enter, he shall not first begin to avoid the exchange. Shepherd Touchstone, 297. So if two parsons, by consent of patron and ordinary, exchange their preferments, and the one is presented, instituted, and inducted, and the other is presented and instituted, but dies before induction, the former shall not keep his new benefice, because the exchange was not completed, and therefore he shall return back to his own. Perk. s. 288. 2 Bl. Com. 323. But if the parties enter at any time during their lives, it is sufficient, unless the possession be previously devested by an elder title (as by entry for a condition broken, entry by a disseisor or his heir, or the like), and not revested again before the entry. As if an exchange of land be made between two persons, and before their entry by force of the exchange, both, or one of them, are disseised of the land exchanged, and the disseisor dies seised thereof, and then they enter according to the exchange, and put out the heir of the disseisor, this shall not be said to be an execution of the exchange; but if the disseisee recovers the same land against the heir of the disseisor by writ of entry, and has execution, he may then execute the exchange by entry. Shep. Touch. 297. The necessity of entry may be prevented by making the exchange by lease and release, or some other assurance, calculated to transfer the immediate possession to each party under the operation of the statute of Uses; and all incidents annexed to an exchange at common law will still be preserved. 4 Cru. Dig. 140. But these assurances can be had recourse to only where both parties are capable of being seised to an use, and the subject of the exchange is also capable of such seisin: in other cases therefore it may be made by fine, feoffment, &c. 4 Bart. Prec. Conv. n. 2. Watk. Conv. 106.—[Ed.]

(g) With respect to the effect of an exchange, it is observable, that this mode of conveyance gives the interest, and alters the property of the things exchanged, to either party, according to the agreement. Shep. Touch. 290. And if the exchange be of lands or tenements of any estate of inheritance or freehold, it has a condition and a warranty in law incident to it, *tacite* implied in the word “exchange;” the one, to give a re-entry upon the lands given in exchange, in case of eviction from all or part of the other lands; and the other, to enable the party evicted to vouch and recover over in value so much of his own land, as is equal to what has been recovered from him: so that upon every exchange, either party, in case he be evicted, or lose in action the land taken in exchange, has a double remedy against the other. Ibid. But the warranty is a special warranty; for upon the voucher by force of it, he shall not recover other land in value, but that only which was by him given in exchange. For inasmuch as the mutual consideration is the cause of the

warranty, it shall therefore extend only to land reciprocally given, and not to other land; and this warranty runs only in privity, for none shall vouch by force of it, but the parties to the exchange, or their heirs, and no assignee. 4 Co. 121. Neither can an assignee re-enter, though an exchanger may have the same remedy, by voucher or re-entry, against an assignee. Noy's Max. 61. And in all these cases where one of the parties is evicted out of all or part of the land, or out of part of the estate, by entry, he may enter upon all his land, and avoid the whole exchange; but in case he be impleaded, and a part only be recovered from him, he shall recover so much in value of the other land only as he has lost. As if an exchange be of three acres for three acres, and afterwards one of the parties is evicted out of one of the acres by the entry of a stranger; in this case, he may enter upon all the three acres which he had given in exchange, and avoid the whole exchange; but if one of the acres were gained by disseisin, and the disseisee bring an action and recover against the disseisor, in this case, if he vouch over the other party to the exchange, he shall recover so much in value of the three acres given in exchange as the acre he has lost and no more. See Shep. Touch. 290, 291. 4 Co. 121. 4 Cru. Dig. 140, 141.

Exchanges are sometimes effected by one deed, comprising reciprocal conveyances from each party to the other, of the lands respectively given and taken in exchange, and sometimes by two separate and distinct assurances from each to the other, which will operate as mutual conveyances simply, or as exchanges, accordingly as the word "exchange" is or is not used in them. A covenant for quiet enjoyment, or a warranty, is usually added, though as the word "exchange" implies a warranty, neither of them seem to be materially useful; when covenants are inserted, they should be general, without the qualification of "for and notwithstanding, &c." 4 Bart. Prec. Conv. 72. n. (6) 725. n. (16).

With respect to powers of exchange, which are usually inserted in settlements, it seems that where in a will, or in articles for a settlement, there is no express declaration that the usual power of sale and exchange should be inserted, such a power cannot be inserted. *Wheale v. Hall*, 17 Ves. 80. Sugd. Pow. 137. But in a case where marriage articles contained a clause for all usual powers, it was decided, that powers of sale and exchange came within the meaning of this clause, and ought to be inserted in the settlement, powers of selling, exchanging and investing in new purchases, being usual in settlements. *Peake v. Penlington*, 2 Ves. & B. 311. In well-drawn deeds, in which powers of sale and exchange, and of appointment of new trustees of real estate, are inserted, it is usual to give the trustees of the powers an express authority to revoke the old uses, and to appoint such new uses as will effectuate the intention of the parties, and the declaration for this purpose cannot be too general. Therefore, in the power of sale, it should not be declared that the trustees shall appoint to the purchaser in fee, as a doubt might be entertained by some, whether it warranted an appointment to uses to bar dower; but the trustees should be authorized to limit such uses as will carry the contract into execution. It is not, however, necessary to give express powers of revocation and new appointment; for whatever be the form in which a power of sale is given, it will operate as a power of revocation and new appointment, and may be executed accordingly. Sugd. Pow. 192, 193. *Bishop of Oxford v. Leighton*, 2 Vern. 367. It has been said, that there is not the same strictness in an exchange under a power, as at common law. 1 Mad. Rep. 221, 224. But it seems that neither a power of sale, nor a power of exchange, will authorize a partition. *M'Queen v. Farquhar*, 11 Ves. 467. *Attorney-General v. Hamilton*, 1 Mad. Rep. 214. However, a partition or an exchange may be effected circuitously under a power of sale. See 2 Ves. jun. 101. 4 Bro. C. C. 285. Sugd. Pow. 469. And it seems that a tenant for life under a power of sale and exchange, may sell or exchange with his trustees. *Ibid.* Et vid. 9 Ves. 52. 11 Ves. 480.

We have already had occasion to notice the difference between an exchange and a partition. Ante, vol. 1. p. 718. n. (r). It may be further observed, that a partition, which is the sixth and last of the several kinds of original conveyances before-mentioned, is a deed by which two or more joint-tenants, coparceners, or tenants in common, divide the lands so held among them into separate and several parts, each taking a distinct part in severalty. Here, as, in some instances, there is a unity of interest, and in all a unity of possession, it is necessary that they should all mutually convey and assure to each other, the several estates which they are to take in severalty under the partition. By the common law, coparceners being compellable to make partition, might have made it by parol only, but joint-tenants, and tenants in common, must have done it by deed; and, in both cases, the conveyances must have been perfected by livery of seisin. But the Statute of Frauds has now abolished this distinction, and made a deed equally necessary in all cases. 2 Bl. Com. 323, 324. Every partition implies, and has annexed to it, a warranty in law; and, in all modern deeds of partition, there are mutual covenants for the title. 4 Cru. Dig. 143.

CHAP. XL.*

(451)*

SAME SUBJECT.

OF RELEASES (A).

RELEASES are in divers manners, viz. releases of all the right which a man hath in lands or tenements (1), and releases of actions personal and real, and other things.

LITTLETON.
[Sect. 444.
264 a.]
The different
kinds of re-
leases.

Here our author beginneth with a division of releases.

These words must be referred thus: releases are of two sorts, viz. a release of all the right which a man hath either *in lands and tenements, or in goods and chattels; or there is a release of actions real, of or in lands or tenements; or personal, of or in goods or chattels; or mixt, *partly in the realty, and partly in the personality.

264 a.
Vid. Mirror,
cap. 2. sect. 17.
Vid. Briu. 101.
Bract. lib. 5.
Tract. de Ex-
cept. & lib. 4.
fol. 318 b.
Fleta, lib. 3.
cap. 14.
(452)*
*264 b.
Vid. sect. 492.

"Release," *Relaxatio*. Of the etymology of this word you have heard before. Fleta (a) calleth it *charta de quietâ clamantiâ*.

(a) Fleta, ubi
supra.

(1) &c. added in L. and M.

See further as to a partition, vol. 1. p. 692. n. (m). p. 698. n. (n). p. 701. n. (55). p. 704. n. (o). p. 720. n. (s). p. 726. n. (r). p. 753. n. (83). n. (s). p. 789. n. (v).—[Ed.]

(A) The several species of primary or original conveyances having been explained in the preceding chapters, we now come to consider the secondary or derivative sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. Among this last sort are classed releases; which are defined to be, a discharge or conveyance of a man's right in lands or tenements, to another who has possession, or some estate therein. 2 Bl. Com. 324. 5 Bac. Abr. 680. tit. Release.

By the common law, where a man had the actual possession and right of property in lands, he could only convey them by feoffment, with livery of seisin; but as it frequently happened, that the actual possession was in one person, and the right of possession or right of property in another; in case the person who had the right of possession or right of property was willing to convey those rights to the person who had the actual possession, it was done by a discharge of his right to the person in possession; which species of conveyance acquired the name of a release. A feoffment would, in such a case, have been useless, because it could not transfer the possession, as the person was in possession already. A release is, therefore, a conveyance of a right, to a person in possession. Thus, where a man was disseised, the disseisor acquired the possession, and the right of possession and property remained in the disseisee. Ante, p. 154. n. (A). p. 155. n. (c). Now, if the disseisee agreed to transfer his rights to the disseisor, the proper mode of carrying such an agreement into execution was, by a release; for the disseisor being already in possession, it would have been useless to have made him a feoffment. Gilb. Ten. 53. 4 Cru. Dig. 143, 144.

Releases of land, in respect to their operation, are divided into four sorts, 1st. Releases that enure by way of passing a right, or *mitter le droit*; 2d. Releases that enure by *extinguishment*; 3d. Releases that enure by *enlargement*; and 4th. Releases that enure by way of *passing an estate*, or *mitter l'estate*. The doctrine as to releases in general, and that which particularly relates to releases of land, will be stated in the present chapter: releases of actions, real, personal, and mixt, will be considered in a subsequent part of this work.—[Ed.]

LITTLETON.
[Sect. 444.
264 b.]

RELEASES of all the right which men have in lands and tenements, &c. are commonly made in this form, or of this effect:

LITTLETON.
[Sect. 445.
264 b.]
Release in
deed; by
what words
created.

KNOW all men by these presents, that I, A. of B., have remised, released, and altogether from me and my heirs quiet claimed; or thus, for me and my heirs quiet claimed to C. of D, all the right, title, and claim which I have, or by any means may have, of and in one messuage with the appurtenances in F., &c. And it is to be understood, that these words, *remisise*, et *quietum clamasse*, are of the same effect as these words, *relaxasse*.

264 b.

"*Know all men by these presents, &c.*" Here Littleton sheweth precedents of releases of right: and precedents do both teach and illustrate, and therefore our student is to be well stored with precedents of all kinds.

Bract. lib. 4.
f. 1. 308.
Fleta, ubi su-
pra. 9 H. 6.
35. 24 E. 3.
27. 13 H. 4.
Entr. Conge.
57. (2 Rol.
Abr. 400. 403.
9 Rep. 52.)

"*Remisise, relaxasse, et quietum clamasse.*" Here Littleton sheweth, that there be three proper words of release, and be much of one effect: besides, there is *renunciare, acquietare*, and there may be many other words of a release; as if the lessor grants to the lessee for life, that he shall be discharged of the rent, this is a good release. Vid. Sect. 532 (B).

265 a.
(10 Rep. 47.)
(453)*

"*All the right, title, and claim (totum jus, titulum, et clameum).*" But note, that *jus*, or right, in general signification* includeth not only a right for the which a writ of right doth lie, but also any title or claim, either by force of a condition, mortmain, or the like, for the which no action is given by law, but only an entry.

Release in
law.
27 H. 8. 29.
of an Use.
34 H. 6. 44. of
an Attaint.
3 E. 3. 38.
21 E. 4. 61.
Pl. Com. De-
lemere's
case. (8 Rep.
136. Pl. 155.
186. Hob. 10.
1 Sid. 79. 1
Rol. Abr. 934.
Pl. 36. 5 Rep.
29.)

And it is to be understood, that there be releases in deed, or express releases, whereof Littleton here hath showed an example. These express releases must of necessity be by deed. There be also releases in law, and they are sometime by deed, and sometime without deed. As if the lord disseise the tenant, and maketh a feoffment in fee by deed or without deed, this is a release of the seignory. And so it is, if the disseisee disseise the heir of the disseisor, and make a feoffment in fee by deed or without deed, this is a release in law of the right. And the same law it is of a right in action.

6 E. 4. 3.
21 E. 4. 2.

If the obligor make the obligee his executor, this is a release in law of the action, but the duty remains, for the which the executor may retain so much goods of the testator (c).

(B) Littleton hereafter observes, that a release of all demands is the best and strongest release; and Lord Coke adds, that the word "demand" is the strongest word in the law, except the word "claim:" and that a release of all demands discharges all sorts of actions, rights, and titles, conditions, before and after breach, executions, appeals, rents of all kinds, covenants, contracts, recognizances, statutes, &c. Post, sect. 508. 291 b.—[Ed.]

(c) If a debtor appoints his creditor to the executorship, he is allowed to retain his debt,

If the feme obligee take the obligor to husband, this is a release (455)

in preference to all other creditors of an equal degree. This remedy arises from the mere operation of law, on the ground, that it were absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt. And, therefore, he may appropriate a sufficient part of the assets, in satisfaction of his own demand; otherwise he would be exposed to the greatest hardship; for since the creditor who first commences a suit is entitled to a preference in payment, and the executor can commence no suit, he must, in case of an insolvent estate, necessarily lose his debt, unless he has the right of retaining. Thus from the legal principle of the priority of such creditor as first commences an action, the doctrine of retainer is a natural deduction; but the privilege is accompanied with this limitation, that he shall not retain his own debt as against those of a higher degree; for the law places him merely in the same situation as if he had sued himself as executor, and recovered his debt, which there could be no room to suppose, during the existence of those of superior order. Toll. Law. Ex. 295, 296. Et vid. 2 Bl. Com. 511. 3 Bl. Com. 18, 19. Off. Ex. 32, 142, 143. Com. Dig. Admon. C. 2. 5 Bac. Abr. 686. Rol. Abr. 922, 923. Plowd. 185. 543. 11 Vin. Abr. 73. 261. Winch. 19. 3 Burr. 1380. 1384. But though an executor may retain both at law and in equity for his own debt, as against other creditors of the same degree, 11 Vin. Abr. 265. n. 1 P. Wms. 295. *Georges v. Georges*, 18 Ves. 296; yet equity will restrain him from perverting this privilege to the purpose of fraud. Toll. Law. Ex. 298. Off. Ex. 33. But, if there are not assets, the action is not so much as suspended, and the executor may sue the heir, where the heir is bound. Rol. Abr. 940. Salk. 304. So if a creditor be appointed executor with others, he may sue them, especially if he has not administered. Cro. Car. 372. Jon. 345. Off. Ex. 33. And the bare appointment of a creditor to be executor, if he refuse to act, will not extinguish his legal remedy for the recovery of his debt. *Rowlinson v. Shawe*, 3 T. R. 557.

On the other hand, if a creditor appoints the debtor his executor, such appointment shall operate as a release and extinguishment of the debt; on the principle that a debt is merely a right to recover the amount by way of action, and as an executor cannot maintain an action against himself, his appointment by the creditor to that office discharges the action, and consequently discharges the debt. Toll. Law. Ex. 347, 348. Et vid. 5 Bac. Abr. 686. 2 Bl. Com. 511, 512. Off. Ex. 31. Salk. 299. Plowd. 186. Com. Dig. Admon. B. 5 Rol. Abr. 920, 921. 5 Co. 30. Thus, if the obligee of a bond make the obligor executor, this amounts to a release at law of the debt. 8 Co. 136. If several obligors be bound jointly and severally, and the obligee constitute one of them his executor, it is an extinguishment of the debt, and the executor is incapable of suing the other obligors. Off. Ex. 31. 11 Vin. Abr. 398. So where the obligee in a joint and several bond made one of two obligors his executor, *with others*, and the obligor executor administered; it was held that the action was discharged as to all the obligors, *Cheetham v. Ward*. 1 Bos. & P. 630. The debt is also released where only one of several executors is indebted to the testator, for one executor cannot maintain an action against another. Off. Ex. 31; and after the death of such executor, the surviving executors cannot sue his representative for the debt. Id. 32. Plowd. 264. Leon. 320. Nor is the case varied by the executor's dying, without having proved the will, or having administered (Salk. 300. Plowd. 184. Off. Ex. 31.), or even by his refusal to act with his co-executors (Salk. 308.), unless he formally renounced the office in the spiritual court. Salk. 307. In all these cases the legal remedy is destroyed by the act of the party, and therefore is for ever gone. Cro. Car. 373. Salk. 302; but the effect is different where it is suspended merely by the act of law. Salk. 303; as if administration of the effects of a creditor be committed to the debtor (Off. Ex. 32. 8 Co. 136. Sid. 79.), or if the executrix of an obligee marry the obligor (Leon. 320. Moor. 236. Salk. 306. *Infra*. 264 b.), this is only a temporary privation of the remedy by the legal operation of the grant or marriage. Toll. Law. Ex. 348, 349.

But where the testator has not left a fund sufficient for the payment of his own debts, in that case the debt of his executor shall be assets; the duty remaining, although the action at law be gone; and the executor shall be liable to account for such debt in the spiritual court, or in a court of equity. *Ibid*. Such discharge, however, shall in general be preferred to legacies. For the debt is considered in the light of a specific bequest or legacy to the debtor, for the purpose of discharging the debt; and therefore, though like all other legacies, it shall not be paid, or retained till the debts are satisfied, yet the executor has a right to it exclusive of the other legatees. Id. 350. 2 Bl. Com. 312. But such debt shall not be released even as against legatees, if the presumption arising from the appointment of

(11 H. 7. 4.
20 H. 7. 28.
8 E. 4. 3.)

in law. The like law is, if there be two femes obligees, and the one take the debtor to husband (v).

(455)* *If an infant of the age of seventeen years release a debt, this is void; but if an infant make the debtor his executor, this is a good release in law of the action (1).

But if a feme executrix take the debtor to husband, this is no release in law, for that should be a wrong to the dead, and in law work a *devastavit*, which an act in law shall never work. And so it was adjudged in the king's bench, Mich. 30 & 31 Eliz., in which case I was of counsel.

20 E. 3. 24.
22 E. 3. 4.
Scire Facias,
109. (Mo. 236.
1 L. 20.
8 Rep. 152.

But it is to be observed, that there is a diversity between a release in deed, and a release in law; for if the heir of the disseisor make a lease for life, and the disseisee release his right to the lessee for his life, his right is gone for ever. But if the disseisee doth dis-

a debtor to the executorship be contradicted by the express terms of the will, or by strong inference from its contents. As where a testator leaves a legacy, and directs it to be paid out of a debt due to him from the executor; such debt shall be assets to pay not merely that specific legacy, but all other legacies. 5 Bac. Abr. 687. Toll. Law. Ex. 350. In like manner, if he leave the executor a legacy, it is held to be a sufficient indication, that he did not mean to release the debt. And, in such case, the executor shall be trustee to the amount of the debt for the residuary legatee, or next of kin. *Carey v. Goodinge*, 3 Bro. C. C. 110. Ca. Temp. Talb. 240. 4 Bro. P. C. 180. 5 Bac. Abr. 687. It seems, also, that the naming of a debtor executor, *durante minoritate*, is no discharge of the debt; since he is only executor in trust for the infant, till he comes of age. 11 Vin. Abr. 400. Ld. Raym. 605.—[Ed.]

(D) All contracts between the husband and the wife for debts due *in presenti*, or *in futuro*, or upon a contingency, which may become due during the coverture, are by the marriage released and extinct, because the husband and wife make but one person in law,^a and it seems that an express agreement to the contrary would be void, as being inconsistent with the state of matrimony. 8 Co. 136. Dyer, 140. But promises, covenants, and agreements for the performance of a thing which is not to happen during the coverture, as payment of money after the husband's decease, are not released by the marriage. *Smith and Uz. v. Stafford*, Hob. 216. And in the case of *Gage v. Acton*, it was adjudged by two judges against Holt, C. J., that where A. entered into a bond to his intended wife, conditioned to leave her at his death 1000*l.* if she survived him, such bond was not released by the marriage, as nothing would be due during the coverture, and as it would be contrary to the express agreement of the parties. But Lord C. J. Holt insisted strenuously, that a bond differed from a promise or covenant, being *debitum in presenti*, though *solvendum in futuro*; and that the rule of law could not be controlled by the intention of the parties. Salk. 325. Ld. Raym. 515. Carth. 511. 12 Mod. 288. So, where a man entered into a bond to his intended wife, conditioned to leave her 1000*l.*, and the husband mortgaged his estate and died, not leaving personal assets to discharge the bond; it was decreed, that admitting the bond void at law, yet it ought to be made good in equity, and that she was entitled to redeem and to hold the land till she was satisfied her debt. 2 Vern. 290. 480. Et vid. *Carnel v. Buckle*, 2 P. Wms. 243. And it is now settled, that such a bond may be enforced at law against the heirs of the husband. *Milbourne v. Ewart*, 5 T. R. 381. *Hayes, d. Ford v. Ford*, there cited.—[Ed.]

(1) "If the obligor make the obligee his executor, the obligee may retain; but that is not applicable to the case put here. Therefore, he may make an executor at 17; tamen supra, 89 b. (ante, vol. 1. p. 169.) it is said that it is at 18. It should seem that the case here is understood of 17 complete, et supra, 89. of 18. beginning; and thus the passages agree. D'Avila His. King of France is major at 14 beginning. Thus, it seems, that puberty, which by the civil law holds from 14 to 18, is understood of 18 beginning; and thus our law agrees with the civil law, *impuberi non licet testari before 17 complete, and 18 beginning.*" Lord Nott. MSS. [Butler, Note 211.]

seise the heir of the disseisor, and make a lease for life, by this release in law the right is released but during the life of the lessee: for a release in law shall be expounded more favourable, according to the intent and meaning of the parties, than a release in deed, which is the act of the party, and *shall be taken most strongly against himself (x); and so in the case aforesaid, where the debtor is made executor.

Pl. 184 a.
Finch. 294.)

*265 a.

**ALSO, these words which are commonly put in such releases* (456)*
(3), *scilicet*, (quæ quovismodo in futurum habere potero) *are as* LITTLETON.
void in law; for no right passeth by a release, but the right [Sect. 446.
which the releasor hath at the time of the release made (1) (f). 265 a.]
What things

(3) *Scil.—Etc.* in L. and M. and Roh.

(x) Formerly releases were construed with much nicety and great strictness, and being considered as the deed or grant of the party, were, according to the rule of law, taken most strongly against the releasor. They now, however, receive the same interpretation as other grants and agreements, and are favoured by the judges as tending to repose and quietness. Dyer, 56, 57 a. Plowd. 289. 8 Co. 48. Show. 154. Hence it has been established as a general rule in the construction of releases, that, where there are general words only in a release, they shall be taken most strongly against the releasor; but where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the special words. Mod. 99. Ld. Raym. 235. 5 Bac. Abr. 680.—[Ed.]

(1) To prevent maintenance, and the multiplying of contentions and suits, it was an established maxim of the common law, that no possibility, right, title, or any other thing that was not in possession, or vested in right, could be granted or assigned to strangers. A right in action could not be transferred even by act of law; nor was it considered as transferred to the king by the general transferring words of an act of attainder. (See the Marquis of Winchester's case, 3 Rep. 2 b.)—But a right or title to the freehold or inheritance of lands might be released in five manners.—1. To the tenant of the freehold in fact, or in law, without any privy.—2. To him in remainder.—3. To him in reversion.—4. To him who had right only in respect of privy; as, if the tenant were disseised, the lord, notwithstanding the disseisin, might release his services to him.—5. To him who had privy only, though he had not the right; as, if tenant in tail made a feoffment in fee, after this feoffment no right remained in him; yet, in respect of the privy only, the donor might release to him the rent and services.—6. So, if the terre-tenants and the person entitled to the right or possibility joined in a grant of the lands, it would pass them to the grantee discharged from the right or possibility. See 10 Rep. 49 b. But the common law is altered in the above instances in many respects. On the assignment of things in action, see ante, note 1, to p. 232 b. The passage in the text was cited by lord chief justice Trevor, in delivering his opinion on the case of *Arthur v. Bokenham*, (Fitzgib. 234.) with an observation that the doctrine laid down there by Littleton had never been contradicted. On the transmissibility, conveyance, assignment, and devise of contingent remainders, and executory estates and interests, see Mr. Fearn's Essay on Contingent Remainders and Executory Devises, 6th ed. pp. 364, 365, 366, 367, 368, 369, 370, 371, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, and 562; and Mr. Preston's Treatise on Conveyancing, vol. 1. p. 142. 209. 301. The case of *Roe, dem. Perry v. Jones*, 1 Hen. Black. 30, seems to have established the power of testamentary dispositions of such contingent and executory estates and possibilities, accompanied with an interest, as would be descendible to the heir of the object of them, dying before the contingency or event, on which the vesting or acquisition of them depends.—It has been contended to be a rule of law, that, whatsoever can be devised, may be granted; and consequently, that this case is an authority to show, that the contingent and executory estates and interest, to which it applies, may be granted. [Butler, Note 212.]

(r) See acc. *Arthur v. Bokenham*, Fitzgib. 234. With respect to the things that may be released, it is a rule of law, that no possibility, right, title, or thing in action, shall be granted or assigned to a stranger, on account of the danger of maintenance and of multiplying contentions and suits. *Lampet's case*, 10 Co. 46. But although a mere possibility cannot be released to a stranger, yet all rights, titles, and actions, may be released to the

may be released.
Release of a future right is not binding:

For if there be father and son, and the father be disseised, and the son (living his father) releaseth by his deed to the disseisor all the right which he hath, or may have in the same tenements, without clause of warranty, &c. and after the father dieth, &c. the son may lawfully enter upon the possession of the disseisor, for that he had (4) no right in the land (5) in his father's life, but the right descended to him after the release made, by the death of his father, &c.

265 a.
secus as to a vested right to take effect in futuro;

Note, a man may have a present right, though it cannot take effect in possession, but *in futuro* (2).

(4) *nul*, added in L. and M. and Roh.

(5) *quant il releassases*, added in L. and M. and Roh.

terre-tenant, for securing his repose and quiet, and for avoiding contentions and suits; and, therefore, a right or title to an estate of freehold, be it *in presenti* or *futuro*, may be released in five manners. 1st, To the tenant of the freehold in fact or in law, without any privity. 2d, To the person in remainder. 3d, To the person who is seised of the reversion, without any privity. 4th, To the person who has right only in respect of privity; as if the tenant be disseised, the lord may release his services, in respect of the privity and right, without any estate. 5th, In respect of privity only, without right; as if tenant in tail makes a feoffment in fee, the donee, after the feoffment, has no right, and yet, in respect of the privity only, the donor may release to him the rent and all services, saving fealty. *Infra*, 268 a. 10 Co. 48 a. So, if the terre-tenants and the person entitled to the right or possibility joined in a grant of the lands, it would pass them to the grantee discharged from the right or possibility. *Ibid*.

With regard to the alteration in the common law, in respect of the assignment of *chooses in action*, see ante, p. 113 n. (κ 3). As to the transmissibility, assignment, and devise of contingent remainders, see ante, p. 140. n. (κ).—[*Ed.*]

(2) This doctrine was fully investigated in the case of *Dormer v. Fortescue*, Vin. vol. 18, fol. 413. 3 Atk. 123, 135. Bro. Par. Cas. v. 4. 353, 405. The case there was, that an estate was limited to the use of A. for 99 years, if he should so long live; and after his decease, or the sooner determination of the estate limited to him for 99 years, to the use of trustees and their heirs, during his life, upon trust to preserve the contingent remainders; and after the end of determination of that term, to the use of A.'s first and other sons successively in tail male, with several remainders over. A. having a son, they joined in levying a fine and suffering a common recovery, in which the son was vouched. If the trustees took a vested estate of freehold during the life of A., the recovery was void, there not being a good tenant to the præcipe; but if they took only a contingent estate, the freehold was in the son, and of course there was a good tenant to the præcipe. Upon this point, the case was argued in the court of king's bench, and afterwards on appeal before the house of lords, where all the judges were ordered to attend. Lord chief justice Lee, when the cause was heard in the king's bench, and lord chief justice Willes, in delivering the opinion of the judges in the house of lords, entered very fully into the distinction between contingent and vested remainders.—They seem to have laid down the following points. That a remainder is contingent, either where the person to whom it is limited is not *in esse*; or where the particular estate may determine before the remainder can take place: but that, in every case, where the person to whom the remainder is limited is *in esse*, and is actually capable or entitled to take on the expiration, or sooner determination of the particular estate, supposing that expiration, or determination, to take place at that moment, there the remainder is vested. That the doubt arose, by not adverting to the distinction between the different nature of the contingency, in those cases where the remainder is limited to a person *in esse*, but the title of the remainder-man to take, depends on a collateral or extraneous contingency, which may or may not take place during the continuance of the preceding estate, and those cases, where the preceding estate may endure beyond the continuance of the estate in remainder. Thus if an estate is limited to A. for life, and after the death of A. and I. S. to B. for life, or in tail; there, during the life of I. S. the title of B. depends on the contingency of I. S. dying in the lifetime of A. This is an event, which either may or may not take place during the continuance of the preceding estate; and B.'s estate therefore is neces-

*As he that hath a right to a reversion or remainder, and such a right he that hath it may presently release. But here in the case which Littleton puts, where the son release in the life of his father, this release is void, (b) because he hath no right at all at the time of the release made, but all the right was at that time in the father; but after the decease of the father, the son shall enter into the land against his own release.

The baron make a lease for life and dieth, the release made by the wife of her dower to him in reversion is good, albeit she hath no cause of action against him *in præsentia* (H).

"Without clause of warranty." For if there be a warranty annexed to the release, then the son shall be barred. For albeit the release cannot bar the right for the cause aforesaid, yet the warranty may rebut, and bar him and his heirs of a future right which was not in him at that time: and the reason (which in all cases is to be sought out) wherefore a warranty being a covenant real should bar a future right, is for avoiding of circuity of action (which is not favoured in law); as he that made the warranty should recover the land against the ter-tenant, and he by force of the warranty to have as much in value against the same person. Yet is there a diversity between a warranty and a feoffment; (c) for if there be a grandfather, father, and son, and the father disseiseth the grandfather, and make a feoffment *in fee, the grandfather dieth, the father against his own feoffment shall not enter; but if he die, his son shall enter. And so note a diversity between a release, a feoffment, and a warranty: a release in that case is void; a feoffment is good against the feoffor, but not against his heir; a warranty is good both against himself and his heirs (I).

sarily contingent. But then, supposing I. S. to die; still it remains an uncertainty whether B.'s estate will ever take place in possession; for, if the remainder be limited to B. for life; there if B. dies in A.'s lifetime, A.'s estate would endure beyond the continuance of the estate limited in remainder. The same would be the case if the remainder over were limited to B. in tail, and B. was to die in A.'s lifetime without issue.—Yet, in both cases, it was agreed that B. took, not a contingent, but a vested remainder. Hence, they inferred that it was not the possibility of the remainders over never taking effect in possession, but the remainder-man's not having a capacity or title to take, supposing the preceding estate at that instant to expire or determine, and its being uncertain whether he ever will obtain that capacity or title, during the continuance of the preceding estates that makes the remainder contingent. Upon these grounds they determined that the trustees took a vested remainder, and that the recovery therefore was void. The doctrine established in the case of Dormer and Fortescue is laid down by Sir Edward Coke, 10 Rep. 85; where he, with great accuracy of expression, observes, that where it is dubious and uncertain whether the use or estate limited in future shall ever vest in interest or not, then the use or estate is in contingency; because, upon a future contingent, it may either vest or never vest, as the contingent happens. And see 1 Rep. 137 b.—[Butler, Note 213.]

(H) The wife may release her right of dower in this case to the reversioner, because she cannot recover her dower against the lessee for life without binding his reversion. Hawk. Abr. 352.—[Ed.]

(I) That a warranty annexed to a release may rebut and bar the releasor and his heirs of a future right, which was not in him at that time, see acc. *Doe, d. Hutchinson v. Prestwidge*, 4 Maul. & S. 180, 481. Et vid. 186 a. ante, vol. 1. p. 734. The reason why the feoffor in this case is bound by the feoffment, is, because the operation of this conveyance is not only to pass the present estate of the feoffor, but to bar him of all future and contin-

(2 Rol. Abr. 400. 8 Rep. Ed. Altham's case.) (457)*

(b) Britton, fol. 101. 17 E. 3. 67. 42 E. 3. 21. 10 H. 6. 4. 25 Ass. 7. 27 E. 3. Execution 130. 1 Rep. 112 b.

16 E. 3. Barre 245. Hoe's case, 6 part. fol. 70, 71.

or where a warranty is annexed to the release. (Sect. 706.)

20 H. 6. 20.

(c) 20 H. 6. 43. 21 E. 4. 81. 16 E. 4. tit. Ent. Cong. 21. 9 H. 7. 1 b. 2 E. 3. 38.

*265 b. (Post. 399 a.) 10 E. 2. Confirmation 24. 8 E. 2. Garr. 62. 11 H. 4. 33. 43 E. 3. 17. 42 E. 3. 24. per Finchden. 17 E. 3. 67. Lib. 1. fol. 112, 113. In Albanie's case. (3 Rep. 75.) (1 Rol. Rep. 197.)

A bare authority cannot be released: (458)*

*And here are three diversities worthy of observation, viz. First, between a power or an authority, and a right. Secondly, between powers and authorities themselves. Thirdly, between a right and a possibility.

15 H. 7. 11.

As to the first, if a man by his last will deviseth that his executors shall sell his land, and dieth, if the executors release all their right and title in the land to the heir, this is void, for that they have neither right nor title to the land, but only a bare authority (κ), which is not within Littleton's case of a release of a right. And so it is, if *cestuy que use* had devised, that his feoffees should have sold the land. Albeit they had made a feoffment over, yet might they sell the use, for their authority in that case is not given away by the livery.

secus as to a power of revocation. (1 Rep. 111 a. 173. Ante, 215 a. 218 b. 227 a.)

As to the second, there is a diversity between such powers or authorities as are only to the use of a stranger, and nothing for the benefit of him that made the release (as in the case before) and a power or authority which respecteth the benefit of the releasor; as in these usual powers of revocation, when the feoffor, &c. hath a power to alter, change, determine, or revoke the uses (being intended for his benefit) he may release; and where the estates before were defeasible, he may by his release make them absolute, and seclude himself from any alteration or revocation, as it hath been resolved; which diversity you may read in (d) *Albanie's case* (l).

(d) Lib. 1. Albanie's case, ubi supra. Lib. 5. Hoe's case, 70, 71. 10 H. 6. 4. Neither can a possibility be released. (459)*

*As to the third, before judgment the plaintiff in an action of debt releaseth to the bail in the king's bench all demands; and after judgment is given; this shall not bar the plaintiff to have execution against the bail, because at the time of the release he had but a mere possibility, and neither *jus in re*, nor *jus ad rem*, but the duty is to commence after upon a contingent, and therefore could not be released presently. So if the conusee of a statute, &c. release to the

25 Ass. p. 7. 27 E. 3. Execution 130. Pasch. 38 El. Rot. 621. inter Borough et

gent rights, in or to the property which is so conveyed. Ante, p. 354. n. (s 1). Fitzg. 234.—[Ed.]

(κ) See ante, p. 118, 119. n. (κ 3).—[Ed.]

(l) That a present power, not simply collateral, may be extinguished by release to any one who has an estate of freehold in the land, in possession, reversion, or remainder, see acc. *Albanie's case*, 1 Co. 110 b. Sudg. Pow. 65. And where in a deed executing a power there are words which show that the party has fully executed his power, or which amount to a release of it, he cannot execute it further, 2 Atk. 567; but the intention must appear clearly; therefore a declaration in a deed partially executing a power of jointuring, that it is in bar of dower and thirds, and that the remainder-man shall have the surplus, will not operate as a release, for they are only words put in by conveyancers as of course. *Hervey v. Hervey*, 1 Atk. 561. *Zouch v. Woolston*, 2 Burr. 1136. *Earl of Uzbridge v. Bayly*, 1 Ves. jun. 499. And where the power is future, and to arise by a contingent event, it may be defeasanced, and thereby utterly annulled. *Albanie's case*, supra. So it may be defeated in part. Thus, where a man had a general executory power of revocation, and he covenanted not to exercise the power without the consent of the Lord Keeper; and granted, that all revocations without such consent should be void, it was determined that the power being executory might well be defeated by a subsequent deed. *Leigh v. Winter*, 1 Jo. 411. Et vid. *Earl of Tankerville v. Coke*, Mose. 146. But it seems to have been doubted whether a power can be released in part. *Digger's case*, Mo. 605. Sed vid. *Countess of Roscommon v. Fawke*, 4 Bro. P. C. 523. Sudg. Pow. 65, 66.—[Ed.]

consor all his right in the land, yet afterwards he may sue execution; for he hath no right in the land till execution, but only a possibility; and so have I known it adjudged (1).

Gray. (2 Rol. Abr. 404. 408. Hob. 46. 2 Cro. 401. 449.)

Nota, a seignory, rent, or right, either *in præsenti* or *in futuro*, may be released five manner of ways, and the first three without any privity. First, to the tenant of the freehold in deed or in law. Secondly, to him in remainder. Thirdly, to him in the reversion. The other two in respect of privity; as, first, the lord releaseth his seignory to the tenant being disseised, having but a right, and no estate at all: secondly, in respect of the privity, without any estate or right; as by the demandant to the vouchee, or donor to the donee, after the donee hath discontinued in fee, as appeareth hereafter in this chapter.

268 a.
How a release is to be made.
Lib. 10. fol. 48.
Lampet's case. Post. 275. (2 Rol. Abr. 402.)

Sect. 455.

See for this word (*privity*) sect. 461.

LITTLETON.
[Sect. 447.
265 b.]

ALSO, in releases of all the right which a man hath in certain lands, &c. it behoveth him to whom the release is made in (6) any case, that he hath the freehold in the lands (7) in deed, or in law, at the time of the release made, &c. (8). For in every case where he, to whom the release is made, hath the *freehold in deed, or in law, at the time of the release, (9) &c. (10) there the release is good (N).

Releases of land.
1. Release do mitter le droit.
To whom to be made.
Release do mitter le droit to a person having a freehold in deed, or in law, is good.
(460)*

"Of all the right." This must be intended of a bare right, and not of a release of right, whereby any estate passeth, as to a lessee for years, &c. as shall be said hereafter. Also it must be intended of a release of a right of freehold at the least, and not to a right for any term for years or chattel real; as if lessee for years be ousted, and he in the reversion disseised, and the disseisor maketh a lease for years, the first lessee may release unto him. All which is implied in the first &c.

265 b.
49 E. 3. 28.
(Doct. & Stud. 18a. 10 Rep. 43b. Post. 276 a.)

FREEHOLD in law is, as if a man disseiseth another, and (11) dieth seised, whereby the tenements descend to his son, albeit

LITTLETON.
[Sect. 448.
266 b.]

(6) *Ascun—tiel*, in L. and M. and Roh.

(9) *fait*, added in L. and M. and Roh.

(7) *Ec.* added in L. and M. and Roh.

(10) *donque*, not in L. and M. nor Roh.

(8) *Ec.* not in L. and M. nor Roh.

(11) *ent*, added in L. and M. and Roh.

(1) In the king's bench, where the proceeding is by bill, the bail is not bound in a certain sum to the plaintiff, but only undertakes that the defendant shall pay the condemnation-money, or render his body to prison: so that they are but in nature of jailors to the defendant: but in the common pleas, the bail are bound to the plaintiff in a certain sum. 5 Rep. 70. 10 Rep. 15. [Butler, Note 215.]

(N) See note (A) at the commencement of this chapter, p. 451. and n. (r) supra, p. 456. With respect to releases *de mitter le droit*, it is observable, that releases are said to enure by way of *mitter le droit*, where a person who has been disseised releases to the disseisor, or to the heir or feoffee of the disseisor, who, being in possession, is therefore capable of taking a release of the right. And as, in cases of this kind, nothing but the bare right passes, the release is said to enure by way of *mitter le droit*. Gilb. Ten. 55. 5 Bac. Abr. 690. Releases (C 2.) No words of limitation are necessary in a release that enures by way of *mitter le droit*; for if a release of right be made to a person seised in fee, for a day, or an hour, it will be as strong as if it were made to the releasee and his heirs for ever. Infra, 274 a.—[Ed.]

that his son doth not enter into the tenements, yet he hath a freehold in law, which by force of the descent is cast upon him, and therefore a release made to him, so being seised of a freehold in law, is good enough; and if he taketh wife being so seised in law, although he never enter in deed, and dieth, his wife shall be endowed (12).

266 b.
(Doct. & Stud.
17 a.)
(e) Bract. 1. 4.
fol. 208. 236.
Britton, fol.
83 b. Fleta,
lib. 3. cap. 15.
Vid. sect. 680.

Here Littleton describeth what a freehold in law is, for he had spoke before in many places of freeholds in deed. This Bracton calleth (e) *civilem et naturalem possessionem seu seisinam*. The natural seisin is the freehold in deed, and the civil the freehold in law (o).

(461)*
42 E. 3. 20.
10 H. 6. 14.
17 E. 3. 78.
2 E. 3. 33.
(6 Rep. 123 b.)
(Mo. 141.)

*If a man levy a fine to a man *sur conusance de droit come ceo que il ad de son, done*, or a fine *sur conusance de droit tantum*; these be feoffments of record, and the conusee hath a freehold in law in him before he entereth (1).

11 H. 4. 61.
21 H. 7. 12.

Upon an exchange, the parties have neither freehold in deed, nor in law, before they enter; so upon a partition, the freehold is not removed until an entry.

(f) 32 E. 3.
Barre, 262.
41 Ass. 2. 13
H. 4. Sur-
render, 10.
(g) 38 E. 3. 12.

(f) If tenant for life by the agreement of him in the reversion surrender unto him; he in the reversion hath a freehold in law in him before he enter. (g) Upon a livery within the view no freehold is vested before an entry.

If a man doth bargain and sell land by deed indented and inrolled, the freehold in law doth pass presently. And so when uses are raised by covenant upon good consideration (q).

17 E. 3. 77.
18 E. 4. 26.

If a tenant in a *præcipe*, being seised of lands in fee, confess himself to be a villain to an estranger, and to hold the land in villenage of him, the estranger by this acknowledgment is actually seised of the freehold and inheritance without any entry. But let us return to Littleton.

(12) &c. added in L. and M. and Roh.

(o) See further as to the term *freehold*, ante, vol. 1. p. 487. n. (c). For a definition of the word *seisin* see ante, vol. 2. p. 334. n. (c); and as to the words *disseisin* and *discontinuance*, post, Chap. 47. and Chap. 50.—[E4]

(1) But a common recovery vests no freehold, in deed or in law, before execution sued. Moor. 141. [Butler, Note 218.]

(q) The possession, or rather legal estate, transferred by the operation of the Statute of Uses, is equivalent, in most respects, to a possession or legal interest acquired by an *actual entry*, or attornment, under a conveyance at common law. Therefore if a bargain and sale be made for years of land in the possession of the bargainor, such estate for years is capable of receiving a release of the reversion before an actual entry by the bargainee, *Lutwich v. Mitton*, Cro. Jac. 604; but it seems doubtful, whether the bargainee can maintain an action of *trespass* before an actual entry. 1 Vent. 361. Cro. Jac. 604. So a bargainee of a reversion may avow for rent, or bring an action for waste without attornment, 6 Co. 68 a; but it seems, that he must give notice of the bargain and sale, before he can take advantage of a condition for non-payment of rent. Cro. Jac. 146. 176. 5 Co. 113. Ow. 69. 2 Saund. 44, 45.—[Ed.]

*ALSO, in some cases of releases of all the right, albeit that he to whom the release is made, hath nothing in the freehold in deed nor in law, yet the release is good enough. As if the disseisor letteth the land which he hath by disseisin to another for term of his life, saving the reversion to him, if the disseisee or his heir release to the disseisor all the right, &c. this *release is good, because he to whom the release is made, had in law a reversion at the time of the release made (a).*

LITTLETON.
[Sect. 449.
266 b.]
So if the re-
leasee have a
reversion;

*267 a.
(Flo. 362.)

*Here Littleton addeth a limitation to the next precedent section, viz. that a release of all the right may be good to him in reversion, albeit he hath nothing in the freehold, because he hath an estate in him.

(462)*
267 a.
7 E. 4. 13.
14 H. 4. 32 b.
41 E. 3. 17.
49 E. 3. 28.
case ult.

“All the right, &c.” Or title, interest, demand, or the like: and so it is, if he in the reversion hath an estate for life or in tail in reversion, as in the like case it appeareth in the next section.

IN the same manner it is, where a lease is made to a man for term of life, the remainder to another for term of (13) another man's life, the remainder to the third in tail, the remainder to the fourth in fee, if a stranger which hath right to the land releaseth all his right to any of them in the remainder, such release is good, because every of them hath a remainder in deed vested in him.

LITTLETON.
[Sect. 450.
267 a.]
or a remain-
der.

Here is another limitation, that a release is good to him in the remainder, albeit he hath nothing in the freehold in possession, because he hath an estate in him, as hath been said. In both these limitations it is to be observed, that the state which maketh a man tenant to the *præcipe*, is said to be the freehold, as here the state of tenant for life, and not the reversion in fee.

267 a.
7 E. 4. 13.
41 E. 3. 7. 17
E. 3. 54. 18 E.
2. ut. Entrie
74. 3 E. 2.
ut. Entrie 7.
F.N.B. 207 E.

BUT if the tenant for term of life be disseised, and afterwards he that hath right (the possession being in the disseisor) releaseth to one of them to whom the remainder was made all (14) his right, this release is void, because he had not (15) a remainder in deed at the time of the release made, but only a right of a remainder.

LITTLETON.
[Sect. 451.
267 a.]
But if made
to a person
having only
a bare right,
it is void.

“But only a right of a remainder, &c.” For a release of a right to one that hath but a bare right regularly is void; for, as Littleton hath before said, he to whom a release is made of a bare right in lands and tenements, must have either a freehold in deed or in law in possession, or a state in remainder or reversion in fee, or fee tail, or for life.

267 a.
Vid. sect. 454.

(13) *auter*, not in L. and M. nor Roh. nor in Cambr. MSS.

(14) *son—le*, L. and M. and Roh.

(15) *en luy*, added L. and M. and Roh.

(a) See *supra*, n. (A), p. 451.—[Ed.]

(463)*

265 b.

Exceptions to
this rule.

(h) 7 E. 4. 13.

20 H. 6. 29.

5 H. 7. 41.

18 E. 3. 12.

8 H. 4. 5. 5 E.

3. 36. 5 E. 3.

46. Vid. sec.

490. 491. (Post,

284 b.) (1 Rep.

87 b. 3 Rep.

29 b.)

*266 a.

(i) 10 E. 4. 14.

12 Ass. p. 41.

*In some case a release of a right made to one that hath neither freehold in deed, nor freehold in law, is good and available in law, (h) as the demandant may release to the vouchee, and yet the vouchee hath nothing in the land: but the reason of that is, for that when the vouchee entereth into the warranty, he becometh tenant to the demandant, and may render the land to him, in respect of the privacy; but an estranger cannot release to the vouchee, because, *in rei veritate*, he is not tenant of the land.

*(i) And so it is, if the tenant alien hanging the *præcipe*, the release of the demandant to the tenant to the *præcipe* is good, and yet he hath nothing in the land (s).

LITTLETON.

[Sect. 490.

284 a.]

(2 Inst. 244.)

(Ante, 266,

267.)

*284 b.

ALSO, a release of all the right, &c. in some case is good, made to him which is supposed tenant in law, albeit he hath nothing in the tenements. As in a *præcipe quodd reddat*, if the tenant alien the land hanging the writ, and after the demandant releaseth *to him all his right, &c. this release is good, for that he is supposed to be tenant by the writ of the demandant, and yet he hath nothing in the land at the time of the release made.

LITTLETON.

[Sect. 491.

284 b.]

IN the same manner it is if in a *præcipe quodd reddat* the tenant vouch, and the vouchee enters into warranty, if afterward the demandant release to the vouchee all his right (16), this is good enough, for that the vouchee, after he hath entered into warranty, is tenant in law to the demandant, &c. (17) (τ).

284 b.

(h) 10 E. 4. 13.

12 Ass. 41.

22 Ass. 13.

23 E. 3. 21.

25 E. 3. 40.

33 E. 3. 10, 11.

7 E. 3. 6. 19

E. 3. tit. Res-

ceit. 34 E. 3.

tit. Resceit.

9 E. 4. 16. 39

H. 6. 40. 17

Ass. 24. 8 H.

7. 5. 20 Ass.

2. 14 E. 3.

Procedendo

4. 9 E. 3. 17.

32 E. 3.

Quare Imp. 2

Dyer. 17 Eliz.

341. Sect. 447.

(464)*

(*) Vid. de-

vant Sect.

447. (Ante,

266 b. Post,

273 a.)

266 a.

8 E. 3. 21. 46

E. 3. 6b. 8 H.

Here it doth appear, that there is a tenant in deed and a tenant in law, and Littleton, in these sections putteth two examples of tenants in law, viz. (h) the tenant to a *præcipe* after alienation, and of the vouchee, whereof somewhat hath been said before.

And it is observable, that Littleton saith, that in both *cases he is tenant in law to the demandant, and yet he hath nothing in the land. And therefore if after the vouchee hath entered into warranty, and become tenant in law, an ancestor collateral of the demandant releaseth to the vouchee with warranty, he shall not plead this against the demandant, for that the release by the estranger is void, which, besides the authorities before vouched, appeareth by Littleton himself (*); for he saith, that he is tenant in law to the demandant, whereby he excludeth that he is tenant in respect of any estranger.

In time of vacation an annuity, that the parson ought to pay, may be released to the patron in respect of the privacy (v); but a release

(16) &c. added L. and M. and Roh.

(17) &c. not in L. and M. nor Roh.

(s) The vouchee having entered into the warranty, and the tenant to a *præcipe*, notwithstanding he has aliened, may take a release from the demandant, for they are tenants in law as to him, and it is presumed that they are as much concerned to answer his action as if they were tenants in deed. Hawk. Abr. 253, 254.—[Ed.]

(*) See the last note.—[Ed.]

(v) Acc. *Bentham v. Alton*, 2 Vern. 204. And the reason is, because the fee is in the patron during the vacancy. Ibid.—[Ed.]

to the ordinary only seemeth not good, because the annuity is temporal.

If a disseisor make a lease for life, the disseisee may release to him; for to such a release of a bare right there needs no privity, as shall be said hereafter. But if the disseisor make a lease for years, the disseisee cannot release to him; because he hath no estate of freehold (w). And yet in some case a right of freehold shall drown in a chattel; as if a feme hath a right of dower she may release to the guardian in chivalry, and her right of freehold shall drown in the chattel, because the writ of dower doth lie against him, and the heir shall take advantage of it. And it is to be observed, that by the ancient maxim of the common law, a right of entry, or a chose in action, cannot be granted or transferred to a stranger (x), and thereby is avoided great oppression, injury, and injustice. *Nul charter, nul vende, ne nul done vault perpetualment si le donor n'est seisie al temps de contracts de 2. droits, si del droit de possession, et del droit del proprietie.* And therefore well saith Littleton, that he to whom a release of a right is made must have a freehold.

*By Sect. 469. it appeareth, that to a release of a right, made to any that hath an estate of freehold in deed or in law, no privity at all is requisite. As if a disseisor make a lease for life, if the disseisee release to the lessor, this is good, and directly within the rule of Littleton, because the lessee hath an estate of freehold, albeit there be no privity. And so it is, if a disseisor make a lease to A. and his heirs during the life of B., and A. dieth, a release by the disseisee to his heir, before he doth actually enter, is good.

ALSO, sometimes releases shall enure de mitter, and vest the right of him, which makes the release, to him to whom the release is made. As if a man be disseised, and he releaseth to his disseisor all his right, in this case the disseisor hath his right, so as where before his state was wrongful, now by this release it is made lawful and right (y).

"And he releaseth to his disseisor, &c." This release so putteth the right of the disseisee to the disseisor, that it changeth the quality of the estate of the disseisor; for where his estate was before wrongful, it is by this release made lawful. But how far, and to what respects his estate is changed, shall be said hereafter in this Chapter in his proper place.

(w) A release *de mitter le droit*, we have seen, cannot be made but to the tenant of the freehold, either in deed or in law, *supra*, 265 b. p. 459; for the presumptive right is in the freeholder (though he comes in by disseisin) during his possession; and the lessee for years takes and retains the possession but as his bailiff; and since the action and entry are only on the freeholder, he only is capable of a release, and the lessee for years is a stranger. *Gilb. Ten.* 54. A release which operates by way of enlargement, however, may be made to a person who has only a chattel interest, as will appear hereafter. *Infra*, 270 a.—[*Ed.*]

(x) As to the alteration of the common law, in respect of the assignment of choses in action, see *ante*, p. 113. n. (x 3).—[*Ed.*]

(y) See *ante*, n. (l), p. 458. and *infra*, n. (z).—[*Ed.*]

6.23. 21 H.7.
41. (*Ante*, 294
a. 8 Rep. 148.
5 Rep. 24 b.
2 Cro. 151.)

Release de
mitter le
droit to the
disseisor's
lessee for
life, is good
(no privity
being requi-
site):
secus if made
to his lessee
for years.

(*Dyer*, 30 b.
2 Cro. 105.)

Mirror, cap.
2. sect. 17.
(2 Rol. Abr.
45, 46, 47, 48.
Ante, 214 a.
232 b. Post,
280.)

(465)*
275 a.
(*Ante*, 206.)

LITTLETON.
[Sect. 466.
274 a.]
How it shall
enure.

274 a.
Release de
mitter le
droit being
made by dis-
seisee to the
disseisor, his
estate be-
comes lawful.

LITTLETON.
[Sect. 472.
275 b.]
So if made to
one of two
disseisors, it
enures to him
alone.
But if made to
one of two feo-
offees of a dis-
seisor, it
enures to
both.

ALSO, if a man be disseised by two, if he release to one of them, he shall hold his companion out of the land, and by such release he shall have the sole possession and estate in the land. But if a disseisor, enfeoff two in fee, and the disseisee release to one of the feoffees, this shall enure to both the feoffees, and the cause of the diversity between these two cases is pregnant enough.
(18) *For that they come in by feoffment, and the others by wrong, &c. (z).*

(466)*
276 a.
21 H. 6. 41.
(Ante, 194 b.
5 Rep. 70.)

*“*But if a disseisor enfeoff two, &c.* And the reason of this diversity is, for that the feoffees are in by title, and are presumed to have a warranty (A 1), which is much favoured in law, and the disseisors are merely in by wrong. And the equity of the law doth preserve in this case the benefit of the stranger to the release coming in by one joint title.

“*For that they come in by feoffment, and the others by wrong.*” This is of a new addition, and not in the original, and therefore I pass it over.

LITTLETON.
[Sect. 452.
267 b.]
So if made to
a reversioner
or remain-
der-man, it
enures to the
particular
tenant.

LITTLETON.
[Sect. 453.
267 b.]
et c. converso.

AND note, that every release made to him, which hath a reversion or a remainder in deed, shall serve and aid him who hath the freehold, as well as him to whom the release was made, if the tenant hath the release in his hand (19) to plead.

IN the same manner (20) it is, where a release (21) is made to the tenant for life, or to the tenant in tail, (22) this shall enure to them in the reversion, or to them in the remainder, as well as to the tenant of the freehold, and they shall have as great advantage of this, if they can show it (23).

(18) The remainder of this Section not in L. and M. nor Roh.

(19) *de pleader*, not in L. and M. nor Roh.

(20) *est lou*, not in L. and M. nor Roh.

(21) *est*, not in L. and M. nor Roh.

(22) *ceo*, not in L. and M. nor Roh.

(23) *Et c.* added in L. and M. and Roh.

(z) Where the disseisee releases to the disseisor himself, it alters the right; but where to the feoffee, it does not alter his title; for the disseisor coming in by wrong, the possession is only in him, and there is no notorious title, but only the bare possession; and therefore a release makes good that possession by making it rightful. But the feoffee comes in by title, and therefore the release cannot alter the title; for the feoffment, being a notorious act, must be defeated by an act of equal notoriety, before any alteration can be made in such title. Therefore, in the case of a release by the disseisee to one of two disseisors, the releasee shall hold out his companion, because the disseisor comes in by no lawful or established act of notoriety, which ought to be defeated before the manner of possessing can be altered; and, consequently, though he possessed as a joint-tenant before the release, yet after the release he shall hold out his companion, because he was possessed of the whole before by wrong, and now being possessed by right, it follows that the possession of the other wrong-doer is no possession at all. But where the disseisor had enfeoffed two, the release of the disseisee to one enures to both, because, as they came in by the legal notoriety of a feoffment, that must be defeated by an act of equal notoriety, before the title can be altered; since the feoffment must stand good as an act that gives warning to all persons in whom the freehold subsists, till by some act of equal solemnity it appears that the freeholder is in another. Gilb. Ten. 55, 56.—[Ed.]

(A 1) And which warranty, if the release should enure by way of entry and feoffment.

By this it appeareth, that as a release made of a right to him in reversion or remainder, shall aid and benefit him that hath the particular estate for years, life, or estate tail, so a *release of a right made to a particular tenant for life, or in tail, shall aid and benefit him or them in the remainder. 267 b. (467)*

"If the tenant hath the release in his hand to plead." And so it is in both cases; for albeit he in the reversion or remainder is a stranger to the deed, when the release is made to the tenant, and the tenant for life or in tail is a stranger to the deed, when the release is made to him in reversion or remainder, yet seeing they are privies in estate, none of them in pleading shall take benefit thereof, without showing the same in court, which is worthy to be observed. 35 H. & S.

"If they can show this." The one cannot plead the release made to the other without showing of it, for that they are privy in estate, as hath been said. The residue of these two sections needs no explication. (Ante, 232 a. Hob. 66. 2 Rol. Abr. 412.)

If two disseisors be, and they make a lease for life, and the disseisee release to one of them, this shall enure to them both, and to the benefit of the lessee for life also; for he cannot by the release have the sole possession and estate, for part of the estate is in another (B 1). 276 a. But a release to one of two disseisors after a lease for life, &c. by them, enures to both.

And so it is (as it seemeth) if the disseisors make a lease for years, and the disseisee release to one of them, this shall enure to them both, for by the release he cannot have the sole possession; and it appeareth by Littleton, (sect. 472) that he must have the sole possession, and hold his companion out. But the mortgagee upon condition, having broken the condition, is disseised by two, the mortgagor having title of entry for the condition broken, release to the one disseisor, albeit they be in by wrong, yet the release shall enure to them both for two causes: first, for that they are not wrongdoers to the mortgagor, but to the mortgagee; and by Littleton's case it appeareth, that wrong is done to him that made the release: secondly, that he that makes the release hath but a title by *force of a condition, and Littleton's case is of a right (C 1). Like law of an entry for mortmain, or a consent to ravishment, &c. So where the releasor had but a title by force of a condition; (468)*

Where our author putteth his case of one disseised, put the case that two joint-tenants in fee be disseised by two, and one of the disseisees release to one of the disseisors all his right, he shall not hold or but a right to a moiety;

would be defeated, the estate being defeated to which it was annexed. See Gilb. Ten. 56.—[Ed.]

(B 1) Another reason why it shall enure to both disseisors, is, that if it should enure by way of entry and feoffment, the releasee would avoid his own lease.—[Ed.]

(C 1) The release in this case is not of a right to an ancient estate devested by wrong, but of a title of re-entry by force of a condition, which shall not by construction of law defeat the estate to which it was annexed, without an express re-entry, according to the words of the condition. Hawk. Abr. 369.—[Ed.]

out his companion, because the release is but of the moiety, without any certainty. (p 1).

or where the release is made to the husband of one of two disseisors. (Post, 278 a.)

If a man be disseised by two women, and one of them take husband, and the disseisee release to the husband, this shall enure to the advantage of both the disseisors, because the husband was no wrong-doer, but in a manner in by title.

275 b.
On release do mitier le droit by particular tenant to one of his disseisors, it enures to both:
21 H. 6. 41.
(Ante, 194 a. b.)

(k) 13 E. 4. tit. Discent. F. 29.

*276 a.
(469)*

(Ante, 265 b.
Post, 239 a.)

"*If a man be disseised, &c.*" This is to be understood where tenant in fee-simple is disseised, and release; for if tenant for life be disseised by two, and he releaseth to one of them, this shall enure to them both; for he to whom the release is made, hath a longer estate than he that releaseth, and therefore cannot enure to him alone, to hold out his companion, for then should the release enure by way of entry and grant of his estate; and consequently the disseisor, to whom the release is made, should become tenant for life, and the reversion vested in the lessor, (k) which strange transmutation and change of estates in this case the law will not suffer (x 1). But if lessee for years be ousted, and he in the *reversion* disseised, and the lessee release to the disseisor, the disseisee may enter, for the term of years is extinct and determined. But otherwise it is in case of a lessee for life, for the disseisor hath a freehold, whereupon the release of tenant for life may enure; but the disseisor hath no term for years, whereupon the release of the lessee for years may enure (x 1).

unless the reversion be in the king;

or the disseisin be only of an estate for life;

And so it is, if donee in tail be disseised by two, and releaseth to one of them, it shall enure to them both. But if the king's tenant for life be disseised by two, and he releaseth to one of them, he shall hold out his companion, for the disseisor gained but the estate for life. So if two joint-tenants make a lease for life, and after do disseise the tenant for life, and he release to one of them, he shall hold

(p 1) And if this release should enure by way of entry and feoffment, it would not only divest the estate of the other disseisor, but revest the estate in the other disseisee, who was a stranger to the release.—[Ed.]

(x 1) We have seen, that a release to one of two disseisors of an estate in fee, enures to the releasee alone; but it is otherwise, if tenant in tail, or for life, be disseised by two, and release to one only; for such release will enure to both the disseisors. And the reason of this difference is, that, as the disseisor gains the immediate fee by the disseisin, it must be the conveyance of the right to the immediate fee also that can change the estate. If, therefore, the disseisee in fee, or the tenant for life and remainder-man, release their right to one of the disseisors, it turns his wrongful estate in fee into a rightful one: but if the tenant in tail or for life release their right, they would convey a right to a different estate, than that which was gained by the disseisin; for, in order to turn the wrongful estate into a rightful one, the right which is conveyed must be commensurate with the wrong: if they are not equal in quantity, they must continue distinct, and the first estate remains unaltered. Watk. Gibb. Ten. 591. Infra, 276 a.—[Ed.]

(y 1) In the former case, the lessor might recover in assise before the release, though he could not take the profits, and after the release, he may both recover and take the profits; for the estate gained by the disseisin being wholly defeated, if the disseisor should maintain an action against him for the profits, it must be grounded on the release of the bare and naked right of the lessee for years, which cannot be transferred; but, in the latter case, the lessor cannot have an assise during the life of the lessee for life. Hawk. Abr. 368.—[Ed.]

out his companion, for the disseisin was but of an estate for life (a 1).

If tenant for life be disseised by two, and he in the reversion and tenant for life join in a release to one of the disseisors, he shall hold his companion out, and yet it cannot enure by way of entry and feoffment. But if they severally release their several rights, their several releases shall enure to both the disseisors.

or where the reversioner joins with the particular tenant in the release.

But here in Littleton's case, where tenant in fee-simple is disseised by two, and releaseth to one of them, this for many purposes enureth by way of entry and feoffment, and therefore he, to whom the release is made, shall hold out his companion, and be made sole tenant of the fee-simple. And this holdeth not only in case of a disseisin, but also in case of intrusion and abatement: but necessarily he, to whom the release is made, must be in by wrong, and not by title.

If two men do gain an advowson by usurpation, and the right patron releaseth to one of them, he shall not hold out his companion, but it shall enure to them both; for seeing their clerk came in by admission and institution, which are judicial acts, they are not merely in by wrong: for an usurpation shall cause a remitter, as it appeareth in F. N. B. 31 m. (470)

But if a lease for life be made, the remainder for life, the remainder in fee, and he in remainder for life disseiseth the tenant for life, and then tenant for life dieth, the disseisin is purged, and he in the remainder for life hath but an estate for life (h 1). And so note a diversity where the particular estate for life is precedent, and when subsequent.

19 H. 6. 22.
26 H. 6. 23.
Case de Occupant.
(Ante, 42 b.)

ALSO, if I be disseised, and my disseisor is disseised, if I release to the disseisor of my disseisor, I shall not have an assise nor enter upon (24) the disseisor, because his disseisor hath my right by my release, &c. (25) And so it seemeth in his case, if there be twenty disseised one after another, and I release to the last disseisor, (26) this disseisor shall bar all the others of their actions and titles. And the cause is, (27) as it seemeth, for that in many cases, when a man hath lawful title of entry, (28) al-

LITTLETON.
[Sect. 473.
276 b.]
On release de mitter le droit to a subsequent disseisor, it enures to him in exclusion of the others.

(24) *le—son*, L. and M. and Roh.

(25) *et* not in L. and M. nor Roh.

(26) *celuy disseisor—il*, L. and M. and Roh.

(27) *come il semble*, not in L. and M. nor Roh.

(28) *comment que il n'entra pas—et entre*, L. and M. and Roh.

(a 1) And the release, enuring by way of entry and feoffment, does not diminish the estate of the releasee, nor revert an estate in any not concerned therein; but only divests the estate which the other joint-tenant gained by disseisin.—[Ed.]

(h 1) For the law more respects a lesser estate by right, than a larger estate by wrong. Ante, 42 b. vol. 1. p. 620. That words of inheritance are not necessary in a release which enures by way of *mitter le droit*, because the disseisor, to whom, or to whose feoffee, or heir, it is made, has a fee-simple at the time of the release, see infra, 274 a. and 275 a.—[Ed.]

though he doth not enter, he shall defeat all mesne titles by his release, &c. But this holds not (29) in every case, as shall be said hereafter (1).

276b. Here it is to be observed, that a release by one, whose entry is lawful, to him that is in by wrong, shall purge and take away all mesne estates and titles. And where our author first putteth his case of two estates by wrong, and after of twenty disseisins, all estates be wrong.

(471)* *If A. disseise B., who enfeoffeth C. with warranty, who enfeoffeth D. with warranty, and E. disseiseth D., to whom B. the first disseisee releaseth, this doth defeat all the mesne estates and warranties, because the release of B. is made to a disseisor, and his entry is lawful (1 1).
(Post, 277 b. 278 a.) 21 H. 6. 41. 11 H. 4. 33. 9 H. 7. 26. 2 E. 4. 16. 31 E. 4. 78. 12 Ass. 22. Vid. 3 H. 6. 38.

LITTLETON.
 [Sect. 474.
 276 b.]

If made to the alienee of disseisor's tenant for life, it enures to him in exclusion of the disseisor:
 277 b.

ALSO, if my disseisor letteth the tenements whereof he disseised me to another (30) for term of life, and after the tenant for term of life alieneth in fee, and I release to the alienee, &c. then my disseisor cannot enter causâ quâ supra, albeit that at one time the alienation was to his disinheritance, &c.

"Also, if my disseisor letteth, &c." If the disseisor make a lease for life, and the lessee maketh a feoffment in fee, and the disseisee releaseth to the feoffee, the disseisor shall not enter upon the feoffee; for albeit the release to one joint feoffee of a disseisor, as hath been said, shall not exclude the other, yet a release to the feoffee of a tenant for life in this case shall take away the entry of the disseisor for the alienation which was made to his *disinheritance, he having the inheritance by disseisin, so as he could have no warranty annexed to it, and tenant for life hath forfeited his estate.

*277 a.

secus if the disseisee's entry was not lawful.
 (8 Rep. 147. Sect. 417. 6 Rep. 70. Hob. 279.)

But if the entry of the disseisee were not lawful, it is otherwise. As if a man make a lease for life, and the lessee for life is disseised, and that disseisor is disseised, and he in the reversion releaseth to the second disseisor, the first disseisor shall enter upon the second disseisor, and his entry is lawful; and if the lessee for life re-enter, he shall leave the reversion in the first disseisor; and the cause is, for that the entry of the disseisee, at the time of the release made,

(29) *my—pas*, L. and M. and Roh.

(30) *auter*, not in L. and M. nor Roh.

(1) This is upon the same principle, that, where the title to the possession is equal, the party who obtains the right shall be preferred.—So, by the modern law, where the equity of the parties is equal, he who has the law is to be preferred. [*Butler*, Note 241.]

(1 1) It is observable, that the release, in this case, is made to a disseisor, who comes not to the land in privy of the estate to which the warranty was annexed; and all the right of C. and D. to the said estate being wholly defeated by the release of B., their re-entry cannot recontinue their former possession, but they must be disseisors anew. Hawk. Abr. 370. Here it appears, that where several parties have an equal title to the possession, he who acquires the right shall hold out the others. Upon the same principle, where the two parties have equal equity, the one who has the legal title shall be preferred. Ante, p. 55. n. (1 1).—[*Ed.*]

was *not lawful (κ 1). And the book of (l) 9 H. 7. 25. is to be intended (n) of an estate tail, *mutatis mutandis*. (472)*
(d) 9 H. 7. 25.

If in the case aforesaid, the disseisor make a lease for life, and the lessee infeoffeth two, and the disseisee release to one of the feoffees, this shall bar the disseisor, as hath been said; but yet he shall not hold out his companion for the cause aforesaid.

ALSO, if a man be disseised, who hath a son within age, and dieth, and the son being within age the disseisor dieth seised, and the land descend to his heir, and a stranger abate, and after the son of the disseisee, when he cometh to his full age, releaseth all his right to the abator; in this case the heir of the disseisor shall not have an assise of mort d'ancestor against the abator; but shall be barred (31), because the abator hath the right of the son of the disseisee by his release, and the entry of the son was congeable (L 1), (32) for that he was within age at the time of the descent, &c.

LITTLETON.
[Sect. 475.
277 a.]
On release de mitter le droit by disseisee's son (his entry being lawful) to an abator of the heir of the disseisor, it enures as a bar to the heir.

The reason of this case is, for that the entry of the heir is congeable, and the abator is in the land by wrong. 277 a.

BUT if (33) a man be disseised, and the disseisor maketh a feoffment upon condition, viz. to render to him a certain rent, and for default of payment a re-entry, &c. if the disseisee release to the feoffee upon condition, yet this (34) shall not amend the estate of the feoffee upon condition; for notwithstanding such release, yet his estate is upon condition, as it was before (M 1).

LITTLETON.
[Sect. 476.
277 b.]
On release de mitter le droit to disseisor's feoffee on condition, the condition is not avoided.

(35) And with this agreeth the opinion of all the justices, (473)
Pasch. 9 H. 7.

Here the entry of the disseisee is congeable, and yet the release doth not avoid the condition, because the feoffee is in by title, as hath been said, and may have a warranty (36). And herein our au- 227 b.
9 H. 7. 25.

(31) *d'assise*, added in L. and M. and Roh.

(35) This paragraph not in L. and M. nor Roh.

(32) *&c.* added in L. and M. and Roh.

(36) "The reason of this case in the book here cited is, that the condition is like a covenant between them; and he is estopped from claiming it otherwise; and the diversity following seems to warrant this. Post, 278 b." Lord Nott. MSS. Butler, Note 244.

(33) *ascun*, added in L. and M. and Roh.

(34) *n'amendra—ne, abatera*, L. and M. and Roh. *ne alterast*, Pap. MS. *n'avoidera*, Vell. MS.

(κ 1) As the entry of the disseisee was not lawful, his release cannot enure by way of entry and feoffment; and, therefore, the estate of the releasee being defeated by a mesne title, the right of possession draws the naked right along with it. Infra, 266 a.—[Ed.]

(n) For it is not so expressed in any part of page 25 of the Year Book referred to; and in another place Lord Coke, after observing, that the case in 9 H. T. 25 a. is misprinted, mentions what the reading should be according to the manuscript, which he had seen. See 6 Rep. 76. [Note from the 18th London Edition, 1823.]

(L 1) *i. e.* lawful.—[Ed.]

(m 1) For the feoffee shall not, by force of the release, avoid such condition against his own express acceptance; though if the disseisee had entered and made a feoffment to him, the condition would have been wholly defeated. Infra, 277 b.—[Ed.]

thor expresseth a diversity between a condition in law, and a condition in deed; for, in the case before, when the disseisee releaseth to the feoffee of the tenant for life, the condition in law is taken away, but otherwise it is in this case of a condition in deed.

(Sect. 415.)
Lib. I. fol. 147.
Mayowe's
case.

But, if the feoffee upon condition make a feoffment in fee over without any condition, and the disseisee release to the second feoffee, the condition is destroyed by the release before the condition broken or after. For the state of the second feoffee was not upon any express condition, as Littleton here putteth his case, and he may have advantage of the release, because it is not against his own proper acceptance, as Littleton speaketh in the next section.

14 H. 8. 18.
Per Fort.
(Post, 271 a.
Ante, 276 b.)

But if it be a wrongful title, such a title is taken away by a release; as if A. disseised B. to the use of C., B. release to A., this shall take away the agreement of C. to the disseisin, because it should make him a wrong-doer: as if the disseisor be disseised, the disseisee releaseth to the second disseisor, this taketh away the right the first disseisor had against the second, and a relation of an estate gained by wrong shall never defeat an estate subsequent gained by right against a single opinion, not affirmed by any other, in one of our books.

LITTLETON.
[Sect. 477.
277 b.]
On release de
militier le
droit to dis-
seisor, rent-
charges, &c.
previously
granted by
him, are not
avoided:
(474)*

*IN the same manner it is, where a man is disseised of certain lands, and the disseisor grant a rent-charge out of the same land, &c. albeit the disseisee doth afterwards release to the disseisor, &c. yet the rent-charge remains in force. And the reason in these two cases is this, that a man shall not have *advantage by such release which shall be against his proper acceptance, and against his own grant. And albeit some have said, that where the entry of a man is congeable upon a tenant, if he releases to the same tenant, that this shall avail the tenant, as if he had entered upon the tenant, and after enfeoffed him, &c. this is not true in every case. For in the first case of these two cases aforesaid, if the disseisee had entered upon the feoffee upon condition, and after enfeoffed him, then is the condition wholly defeated and avoided. And so in the second case, if the disseisee entereth and enfeoffeth him who granted the rent-charge, then is the rent-charge taken away and avoided; but it is not void by any such release without entry made, &c.*

277 b.
(6 Rep. 78 b.)
*278 a.

secus as to
charges not
created by
the releasee
himself.
(7 Rep. 38.)
(Post, 349 a.)
(Mo. 36.)

"And the disseisor grant a rent-charge, &c." Here is implied commons, or any other *profit out of the lands. And the reason is, because he shall not avoid his own grant by a release he himself had acquired since the grant: but if the disseisor in that case be disseised, and the disseisee release to the second disseisor, he shall avoid it; as by that which hath been said, sect. 473, appeareth. So, likewise, if A. and B. be joint disseisors, and B. grant a rent-charge, and the disseisee release to A. all his right, A. shall avoid the rent-charge, because it was not granted by him, and so not within the reason of our author.

If there be two femes joint disseisors, and the one taketh husband, (Ante, 276 a.) and the disseisee release to the other, she is sole seised, and shall hold out the husband and wife.

If two disseisors be, and they enfeoff another, and take back an estate for life or in fee, albeit they remain disseisors to the disseisee, as to have an assise against them, yet if he release to one of them, he shall not hold out his companion, because their state in the land is by feoffment (x 1).

If there be two disseisors, and they be disseised, and they *re- (475)* lease to their disseisor, and after disseise him, and then the disseisee release to one or both of them, yet the second disseisor shall re-enter, for they shall not hold the land against their own release; for Littleton here saith, that they shall not avoid their own grant, and by like reason they shall not avoid their own release: *Et sic de similibus*.

"As if he had entered upon the tenant, and after enfeoffed him." Here is another kind of release, viz. a release which enureth by way of entry and feoffment; for if a disseisee release to one of the disseisors, to some purpose this shall enure by way of entry and feoffment, viz. as to hold out his companion. But as to a rent-charge granted *by him, it shall not enure by way of entry and feoffment; for if the disseisee had entered and enfeoffed him, the rent-charge had been avoided. But it is a certain rule, that when the entry of a man is congeable, and he releaseth to one that is in by title, (as here the feoffee upon condition is), it shall never enure by way of entry and feoffment, either to avoid a condition with which he accepted the land charged, or his own grant, or to hold out his companion.

In what cases a release de mitter le droit, shall not enure by way of entry and feoffment. (Ante, 194.) *278 b.

And where it appeareth by our author, that acts done by the disseisor shall not be avoided by the release of the disseisee, it is to be noted, that acts made to the disseisor himself shall not be avoided by the alteration of his estate by the release of the disseisee; as if the lord before the release had confirmed the estate of the disseisor to hold by lesser services, the disseisor shall take advantage of it, and so of estovers to be burnt in the house, and the like law of a warranty made unto him. (Dr. & Stud. 50 a.)

If the heir of the disseisor endow his wife *ex assensu patris*, and the disseisee release to the disseisor, he shall not avoid the endowment, for that is like the case put by Littleton of the rent-charge.

If an alien be a disseisor, and obtain letters of denization, and then the disseisee release unto him, the king shall not have the land, for the release hath altered the estate, and it *is as it were a new purchase; otherwise it is if the alien had been the feoffee of a disseisor (o 1). (476)*

{x 1} See ante, note (z), p. 465, 466.—[Ed.]

{o 1} For it is intended that the feoffee has a warranty, by force of which he may pre-

If the lord disseise the tenant, and is disseised, the disseisee release to the second disseisor, yet the seignory is not revived, for between the parties the release enures by way of entry and feoffment as to the land; but not having regard to the seignory and for that the possession was never actually removed or revested from the disseisor, who claimeth under the lord, the seignory is not revived. But if the lord and a stranger disseise the tenant, and the disseisee release to the stranger, there the seignory, by operation of law, is revived, for the whole is vested in the stranger, which never claimed under the lord: and in that case, if the lord had died, and the land had survived, the seignory had been revived. But if the lord had disseised the tenant, and been disseised by two, and the disseisee released to one of them, the seignory is not revived, because he claimed (as hath been said) under the lord.

266 a.
Mirror, ubi
supra. Bract.
lib. 2. fol. 32.
Britton, fol.
89. 121.
Bract. lib. 5.
fol. 372.
Release of
right being
made to a
person hav-
ing a defeas-
ible posses-
sion, on the
possession
being defeat-
ed, the right
of the land
follows the
right of pos-
session.
(3 Rep. 56.
Sect. 473.
Post. 283 b.
266 a.)

(477)*

For the better understanding of transferring of naked rights to lands or tenements, either by release, feoffment, or otherwise, it is to be known, that there is *jus proprietatis*, a right of ownership; *jus possessionis*, a right of seisin or possession; and *jus proprietatis et possessionis*, a right both of property and possession: and this is anciently called *jus duplicatum* or *droit droit*. For example, if a man be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis* (p 1); and if the disseisee release to the disseisor, he hath *jus proprietatis et possessionis* (q 1). And regularly it holdeth true, that when a naked right to land is released to one that hath *jus possessionis*, and another by a mean title recover the land from him, the right of possession shall draw the naked right with it, and shall not leave a right in him to whom the release is made. For example, if the heir of the disseisor being in by descent, A. doth disseise him, the disseisee release to A. now hath A. the mere right to the land. But if the heir of the disseisor enter into the land, and regain the possession, that shall draw with it the mere right to the land, and shall not regain the possession only, and leave the mere right in A., but by the recontinuance of the possession the mere right is therewith vested in the heir of the disseisor (p 1).

serve his estate, or recover in value if he lose it, which, it seems, the king may take advantage of, as being annexed to the estate, (though he cannot claim a mere right of a real action, as forfeited to him, 3 Co. 2 b.); and the king shall not lose his possibility by such a release, but the disseisor is merely in by wrong. Hawk. Abr. 372.—[Ed.]

(p 1) But see ante, p. 155. n. (c).—[Ed.]

(q 1) See ante, n. (A), p. 153, 154.—[Ed.]

(R 1) The disseisor, or the feoffee of the disseisor, has the bare possession, but the latter by title; and therefore the release to them serves instead of the delivery of the possession by feoffment; but such release passes the right of possession, as well as the right of propriety. But the heir of the disseisor has the right of possession in him, ante, p. 153, 154, n. (A); and therefore the release of the disseisee only passes the right of propriety. Therefore, where the heir of the disseisor is disseised, and the disseisee releases to such disseisor, against whom the heir afterwards recovers, the right of propriety goes along with it; because when the heir recovers, he defeats the possession of the disseisor, as if it had never been, and consequently he can never recover in any action; for in the writ of right he must lay the possession in himself, or some of his ancestors, which he cannot do in this case; for here there never was any possession in him, but what was totally defeated

But if the donee in tail discontinue in fee, now is the reversion of the donor turned to a naked right. If the donor release to the discontinuee, and die, and the issue in tail doth recover the land against the discontinuee, he shall leave the reversion in the discontinuee; for the issue in tail can recover but the estate tail only, and by consequence must leave the reversion in the discontinuee, for the donor cannot have it against his release (s 1): but if the disseisee enter upon the heir of the disseisor, and infeoff A. in fee, and the heir of the disseisor recover the whole estate, that shall draw with it the mere right, and leave nothing in the feoffee (r 1). *Nota*, the diversity.

Another diversity is observable, when the naked right is prece-
dent before the acquisition of the defeasible estate, for there the pre-
continuance of the defeasible estate shall not draw with it the prece-
ding right. (m) As if the disseisee disseise the heir of the dissei-
sor, albeit the heir recover the land against *the disseisor, yet shall
he leave the preceding right in the disseisee (v 1). So if a woman
that hath right of dower disseise the heir, and he recover the land
against her, yet shall he leave the right of dower in her.

or where the
right was
precedent to
the defeasible
estate;
(Post, 319 a.)
(m) 5 Ass. 1.
10 Ass. 16.
50 E. 3. 7. 4
E. 3. Est. pp. 4
133. 30 Ass.
5. 11 E. 3.
Entrie, 56.
12 Ass. 41.
27 E. 3. 84.
488. (6 Rep.
70 a.)

Another diversity is to be noted, when the mere right is subse-
quent, and transferred by act in law; there, albeit the possession be
recontinued, yet that shall not draw the naked right with it, but shall
leave it in him; as if the heir of the disseisor be disseised, and the
disseisor infeoff the heir apparent of the disseisee being of full age,
and then the disseisee dieth, and the naked right descend to him,
and the heir of the disseisor recover the land against him, yet doth
he leave the naked right in the heir of the disseisee (w 1). So, if
the discontinuee of tenant in tail infeoff the issue in tail of full age,
and tenant in tail die, and then the discontinuee recover the land
against him, yet he leaveth the naked right in the issue. (n) But
if the heir of the disseisor be disseised, and the disseisee release to
the disseisor upon condition, if the condition be broken, it shall re-
vest the naked right. And so, if the disseisee hath entered upon the
heir of the disseisor, and made a feoffment in fee, upon condition, if
he entered for the condition broken, and the heir of the disseisor en-

(478)*
or being sub-
sequent, was
transferred
by act of law.

23 H. 8. tit.
Restore al
Action. Br. 5.
50 E. 3. 7.
Vid. sect. 473.
475. 478. 487.

(n) 38 E. 3. 16.
9 H. 7. 24.
(Post, 279 a.
4 Rep. 9 b.)

and destroyed; and he cannot recover by the old possession of the disseisee; for that was
turned into a naked right, which could not be transferred but to a real and true possession;
and here, there being no possession but such as stands defeated, it is the conveyance of a
naked right, which is not allowed, as it would tend to encourage maintenance. Gilb. Ten.
60.—[*Ed.*]

(s 1) And as the donor might have granted the reversion while the tenant in tail was in
possession, so he may release it to the discontinuee, who has the right of possession.
Gilb. Ten. 61.—[*Ed.*]

(r 1) *Supra*, n. (s 1).—[*Ed.*]

(v 1) For in this case, there is no reason, that the right of propriety should be carried
along with the right of possession; for since the right remains in the disseisee unmoved,
and not transferred over to any person, he can recover by virtue of the old seisin, that was
lawfully in him, though this new wrongful possession be defeated. Gilb. Ten. 62.—[*Ed.*]

(w 1) Because, though the new and wrongful possession be defeated, yet he may recover
the right of propriety by force of the ancient rightful seisin, which was in his ancestor.
Gilb. Ten. 62. *Supra*, n. (v 1).—[*Ed.*]

tered upon him, the naked right should be left in the disseisee. But if the heir of the disseisor had entered before the condition broken, then the right of the disseisee had been gone for ever (x 1). But now let us hear what Littleton saith.

(479)*
LITTLETON.
[Sect. 478.
278 b.]

On release de
mitter le
droit le
heir of the
alienee of an
infant dis-
seisor, in a
writ of right
brought by
the disseisor
against the
heir, the mise
being joined
on the mere
right, it shall
be found for
the releasee:
*279 a.

[COKE,
279 a.]

*ALSO, if a man be disseised by an infant (37), who alien in fee, and the alienee dieth seised, and his heir entereth, the disseisor being (38) within age, now is it in the election (39) of the disseisor to have a writ (40) of dum fuit infra ætatem, or a writ of right against the heir of the alienee, and which writ of them he shall choose, he ought to recover by the law (41), &c. And also he may enter into the land without any recovery, and in this case the entry of the disseisee is taken away, *&c. But in this case, if the disseisee release his right to the heir of the alienee, and after the disseisor bringeth a writ of right against the heir of the alienee, and he join the mise upon the mere right, &c. the great assise ought to find by the law, that the tenant hath more mere right (42) than the disseisor (43), &c. for that the tenant hath the right of the disseisee by his release, the which is the most ancient and most mere right: for by such release all the right of the disseisee passeth to the tenant, and is in the tenant. (For seeing the tenant hath the whole fee simple, he is capable of the whole right of the disseisee, and, as Littleton here saith, the right is in the tenant). And to this some have said, that in this case where a man which hath right to lands or tenements (but his entry is not congeable) if he release to the tenant (44) all his right, &c. that such release shall enure by way of extinguishment. As to this it may be said, that this is (45) true as to him which releaseth; for by his release he hath dismissed himself (46) quite (47) of his right as to his person, but yet (48) the right which he hath may well pass to the tenant by his release. For it should be inconvenient that such an ancient right should be extinct altogether, &c. for it is commonly said, that a right cannot die (x 1). (1).

(37) *deins age*, added in L. and M. and Roh.

(38) *le disseisor—l'alienour* in L. and M. and Roh.

(39) *le disseisor—l'allenour* in L. and M. and Roh.

(40) *de* not in L. and M. nor Roh.

(41) *Et.* not in L. and M. nor Roh.

(42) *Et.* added L. and M. and Roh.

(43) *Et.* not in L. and M. nor Roh.

(44) *Et.* added L. and M. and Roh.

(45) *voyer—verite*, L. and M. and Roh.

(46) *quietment*, not in L. and M. nor Roh. —*nettement*, MSS.

(47) *tout*, added L. and M. and Roh.

(48) *le droit que il avoit bien poest passer a le tenant per son release*, not in the Vell. MS. but omitted most probably through mistake.

(x 1) For when the feudal estate, that passed by the feoffment, is defeated, the condition thereunto annexed is destroyed, and is incapable of being performed or broken, and the right can never revert in the disseisee, but upon breach of the condition, which is now become impossible; consequently the right can never revert in him at all, and therefore he can never recover by virtue of his old seisin. But in the above case, if the condition had been broken, and the disseisee had entered, the old right had been revested; and if the heir had entered upon him, he might have recovered by virtue of his ancient seisin. Gilb. Ten. 63. Supra, 266 a.—[Ed.]

(x 1) In the case here proposed, the discussion of which is continued through the five following sections, Littleton distinguishes between releases, which in respect of some

* "*Which writ of them he shall choose, &c.*" Note, many times (480)*
in one case the law doth give a man several remedies, and of seven- 278 b.

(Ante, 45 a.)
Vid. sect. 514.
28 E. 3. 93. 9

persons enure by way of *mitter le droit*, and of other persons by extinguishment, and releases which enure by way of extinguishment against all persons, and of which all men may take advantage. The case put by Littleton is, in substance, that A. is disseised by B., an infant, who makes a feoffment to C., and afterwards C. dies seised, and the land descends to his heir D., B. being still an infant. Under these circumstances, A.'s entry is taken away by the descent; but B. the infant, may either enter, or have a writ of *dum fuit infra ætatem*, or a writ of right. In the mean time, D. obtains a release from A., and afterwards B. brings a writ of right; in this case, he shall be barred by the release from A. to D. For in a writ of right, the question is of the mere right, and the words *modo et forma prout* are mere words of form, and not of substance. Therefore, in the case now under consideration, the release of the disseisee, shall enure by way of extinguishment, in respect to the releasor only, since he by his release has dismissed himself of all the right which was in him: but, in respect to strangers, it shall enure to pass the right which the releasor had to the releasee, in whom it still subsists. *Infra*, Sect. 479, 480, 481, 482, and 483; and see the notes there. With this case Littleton concludes the doctrine relating to releases *de mitter le droit*: the next head to be considered will be releases which enure by way of extinguishment. Some of the distinctions between these two kinds of releases, are incidentally stated in the discussion of the case above proposed. *Infra*, Sect. 479, 480.—[*Ed.*]

(1) Few parts of Littleton's tenures require more attention than the present section, and the five sections by which it is immediately followed.

The case propounded by Littleton, is, that A. is disseised by B. an infant; that B. during his infancy, executes a feoffment, with livery of seisin, to C. and his heirs; that, while B. continues an infant, C. dies, and the land descends to D. and his heirs; that, after this descent, B. attains 21; that A. then releases to D. and his heirs: and that B. then brings a writ of right against D. to recover the land. The feoffment of B. being executed by him during his minority, was originally voidable by him; yet, being only voidable and not void, it conferred on C. an actual estate in fee simple; and this estate would remain in C. till it should be recovered from him by B. or his heirs. Thus the rights of the parties stood immediately upon the execution of the feoffment; and both A. and B. might recover against C. by entry, or by a possessory action, or by a writ of right: and in addition to these remedies, B. might recover against C. by the writ *dum fuit infra ætatem*.

The death of C. during the minority of B. produced a considerable alteration in the right of A. In the Chapter of Descents, which take away entries, it has been shown, (c. 6. § 385). that if a disseisor hath issue, and dies seised of the land acquired by the disseisin, the law casts the land on the issue; and the disseisee thereby loses his right to recover the land by entry, and can only recover it by action. The law is the same, when the disseisor aliens; and the alienee dies seised, and the land descends to his issue. But in section 402, it is observed, that this effect of a disseisin does not hold in cases where both the disseisin and the descent take place during the minority of the disseisee. In respect therefore to A. the death of C. during the minority of B. was attended with this important consequence, that it deprived A. of his right to restore his possession by entry, and reduced him, if he sought to restore it, to the necessity of doing it by action.

In respect to B. the descent of the land, on C.'s decease, to D. was altogether inoperative: so that, in this stage of the title, A. was equally in respect to B. and D. the rightful owner of the fee; B. in respect to A. was the tortious possessor, and in respect to D. was the rightful owner of it; and A. by action, and B. both by entry and action, might recover the land from D. The actions by which A. and B. might recover, were either possessory as a writ of disseisin or assise, or droitural, as a writ of right; in addition to the writs which have been mentioned, B. had the writ *dum fuit infra ætatem*.

Under these circumstances A. released D. Now, if B. had either entered on the land, or brought his possessory action against D., B. would have recovered. For in a suit upon either, the gist would have been, whether B. or D. had the better right to the possession. Now, B. would prove his actual seisin; D. could only produce the feoffment from B. to C. and prove his heirship to C. Against these, B. would plead his non-age; and by proving it, would avoid the feoffment, and consequently obtain judgment. But, instead of entering on the land, or bringing his possessory action, B. unadvisedly proceeds by writ of

E. 4. 46. 21 ral kinds, as in this case by action and by entry; by action, either a
 E. 4. 55. 41 writ of right, or *dum fuit infra ætatem*.
 E. 3. 10. 2H.
 4. 12.

right. In such an action, the gist is, which has the most mere right, the demandant or tenant. If A. had not executed the release to D., B. must have recovered; for possession standing singly, carries with it, as well in a writ of right, as in a possessory action, a good title, till a better is shown. Now, B. was evidently in possession, when he executed the feoffment; but that feoffment was voidable on account of the non-age, and was avoided by the action. Thus, the feoffment standing singly, was no defence against B. But the release altered the case; it conferred the right on D.: and consequently in a droitral action, where the question to be tried is, which of the parties has the most mere right, it gave D. a better title than B.

This, however, was open to the objection noticed by Littleton; that D. having the actual estate of freehold, A.'s right was merged in it by the release; and as, on this supposition, it ceased to exist, D. could not avail himself of it, as a defence against B. Something of this nature occurs in modern law. If a person purchase an estate, which is subject to a judgment, of which, at the time of the purchase, he has not notice, and procures a term of years, prior in its creation to that judgment, to be assigned to a trustee for him, the term will protect him against the judgment. But if, instead of having the term assigned to a trustee, he takes an assignment of it to himself, it merges in the freehold, and cannot afterwards be set up as a protection against the judgment.

Such is the nature of the objection noticed by Littleton. He answers it by observing, that in these cases, the effect of the release is different, in respect to the releasor, from what it is in respect to strangers; for that, in respect to the releasor, it ceases to exist, as by his release the releasor hath dismissed himself quite of his right; but that, in respect to strangers, the right which the releasor had, passes by his release to the releasee, and subsists in him for all beneficial purposes. He proves his position,—1st, by producing the maxim of the common law, that a right cannot die; 2dly, from the general rule, that a release can never operate by way of extinguishment, if the releasee can have that which is released to him. This he shows by the nature of the cases, to which only such releases apply; as, when a lord releases service to a tenant (Sect. 479), or where the owner of a rent-charge or common releases it to the owner of the land, which is subject to it. In the first of these cases, the tenant could not do the service to himself; and in the second, he could not hold, distinct from his land, the servitude with which it was charged: in each case, therefore, the release necessarily operates by way of extinguishment. Hence Littleton infers, that, as releases can only operate by way of extinguishment, when the releasee cannot have the subject which is released, and in the case proposed the releasor could take and hold the right, the release could not operate to extinguish it.

In support of this conclusion, he states (Sect. 481), that, as the law stood before the statute of Westm. 2, if a lease were made to a man for the term of his life, with the remainder over in fee, and a stranger, by a feigned action, recovered the land against the tenant for life, by default; and after the tenant died, the person in remainder had no remedy. On this doctrine of the common law, Littleton (Sect. 482), proposes the following case: A. is a tenant for life, with the immediate remainder to I. S. in fee. I. S. disseises A., and A. being thus disseised, enters on I. S., and C. then brings a feigned action against A. and recovers by default. A. then dies, and I. S. brings a writ of right against C. Now, A. by his entry, defeated the fee which I. S. acquired by the disseisin, but restored his own life estate, and the remainder in fee of I. S. expectant on it; and then in consequence of A.'s default, I. S. according to the doctrine of the common law, would, on A.'s decease, if the previous disseisin had not taken place, have been wholly without a remedy. Yet says Littleton, I. S. shall recover in a writ of right. The reason is given by Lord Coke, in his commentary on Section 482.

"The seisin," says his lordship, "is defeated between the tenant for life, and him in remainder; yet, having regard to the recoveror, who is a mere stranger, and hath no title, it is sufficient against him. But otherwise it is, against the party who defeated the seisin, the law being propense to give remedy to him that right hath." This case, and Lord Coke's explanation of it, exemplify, and, to a certain extent, establish Littleton's position. The analogy between the case propounded by Littleton, and the case which he cites in support of his conclusion on that case, seems to be, that, in each case the possession of the parties in contest was equally tortious; and the law, therefore, preferred the title of him who had the most mere right. For, in the first case, B. the infant acquired the possession by disseisin: D. acquired it by descent from C. who claimed under the voidable

“*And after the disseisor bringeth a writ of right, &c.*” Here it appeareth, that there is a great art and knowledge for a man that hath divers remedies to choose his aptest remedy; as in this case, if he bring his writ of right, the disseisor shall be barred, but if he had entered upon the heir of the alienee, he should have enjoyed the land for ever. For, in that case, the heir of the alienee after such an entry shall never have a writ of right, no more than if the disseisee entereth upon the heir of the disseisor, and make a feoffment in fee, if the heir of the disseisor *re-enter he shall detain the land for ever, and the feoffee shall not maintain any writ of right; for a bare right shall never be left in the feoffee, but shall ever follow the possession, as hath been said (z 1): but if the disseisee entereth upon the heir of the disseisor, and make a feoffment in fee upon condition, and entereth for the condition broken before the heir of the disseisor enter, he is restored to his right again (A 2).

though the disseisor might have entered.

*279 a.
(Ante, 266 a.)
38 E. 3. 16.
24 H. 8. Re-
store al pri-
mer A. ton. 5.
Vid. sect. 447.

feoffment of B. But, as the release of A. conferred A.'s right to the land on D. the law preferred his title to that of B., as D. by the acquisition of the right of A. had most mere right. In the other case, I. S. acquired the possession by disseisin, and C. acquired it under a covinious default. But though I. S. by his tortious entry, accelerated his possession of the estate; yet, under the original settlement of the land, he became, on A.'s decease, the rightful owner of it. The law, therefore, considered that the title of I. S. which was originally a rightful estate, should be preferred to the title of C. which was originally founded in collusion between him and A.; and therefore adjudged it to I. S. as having the most mere right. These observations seem to explain the sections to which they are applied; and the nature of the argument, suggested by Littleton in support of his opinion, and the case by which he illustrates it. With respect to the statute of Westminster 2, mentioned by Littleton, it has been stated, that, at common law, if a man were tenant for life, with remainders over, and a stranger, by a feigned action, recovered against the tenant for life, the remainder-man had no remedy, till it was supplied by this statute.

Further remedy was provided for them, by the statute 32 Hen. 3. c. 31. which enacted, that all common recoveries suffered by tenant for life, without the consent of the persons in remainder or reversion, should be totally void.

To avoid the effect of this statute, the tenant for life sometimes made a lease for years; the lessee then made a feoffment, and a præcipe was brought against the feoffee, and he vouched the tenant for life. It was held that, as the tenant for life was disseised by the feoffment of his lessee for years, he was not the actual tenant for life, or seised of the actual freehold when the recovery was suffered; and did not, therefore, fall within the terms of the statute of Hen. 8. To bring such cases within the intended remedy, the statute of 14 Eliz. c. 8. was passed; which enacted that recoveries prosecuted against tenants for life, or in tail, after possibility of issue extinct, or against any other with the voucher of the particular tenant, should be void against all persons in remainder or reversion; with a proviso, that nothing in the act should extend to recoveries by good title, or to recoveries by assent and agreement of the persons in remainder or reversion, so that such assent and agreement appeared of record in any of her majesty's courts: and the statute of 32 Hen. 8. was repealed. In consequence of the last proviso in the statute, a tenant for life may now join with the person in remainder or reversion, in suffering a common recovery. This was first settled in *Wiseman v. Crow*, Eliz. 562; and is every day's practice.

It sometimes happens, that a tenant in tail supposing himself seised in fee, executes a settlement, and takes an estate for life under it: a question has been made, whether such a tenant for life is prevented from suffering a recovery by the statutes cited. It seems to be clear, that he is not; as all the deeds must be considered as forming one conveyance, and as referring back to the original conveyance, executed by the party when he was actually tenant in tail; so that the recovery and the deed leading the uses of it, operates merely by way of further assurance.—[*Butler*, Note 244.]

(z 1) See supra, 266 a. p. 477. and n. (r 1) there.—[*Ed.*]

(A 2) Supra, 266 a. p. 478. and n. (x 1) there.—[*Ed.*]

9 H. 7. 24.
(481)*

A man maketh a gift in tail, the remainder in fee, tenant in tail dieth without issue, an estranger intrude, and he in *the remainder brings a formedon, and recovereth by fault, and maketh a feoffment in fee, the intruder reverse the recovery in a writ of deceit, and entereth, he shall detain the land for ever, and the feoffee shall not have a writ of right (b 2).

9 H. 7. 24.

And so likewise if a disseisor die seised, and a stranger abate, and the disseisee release to him, the heir of the disseisor shall enter and detain the land for ever. For the right to the possession shall draw the right of the land to it, and shall not leave a right in him to whom the release is made, as hath been said before in the 447th Section (c 2).

Vid. sect. 57.
138, 139, 231.
269, 440, 722.

"*It should be inconvenient.*" Here again, as hath been often observed, an argument *ab inconvenienti* is forcible in law; and that judges, by the authority of our author, are to judge of inconveniences as of things unlawful, as hereby and *by many other places it appeareth (d 2).

*279 b.

"*A right cannot die.*" *Dormit aliquando jus, moritur nunquam.* For of such an high estimation is right in the eye of the law, as the law preserveth it from death and destruction: trodden down it may be, but never trodden out. For where it hath been said, that a release of right doth in some cases enure by way of extinguishment; it is so to be understood, either (as Littleton doth here) in respect of him that makes the release, or in respect that by construction of law it enureth not alone to him to whom it is made, but to others also, who be estrangers to the release, which, as hath been said, is a quality of an inheritance extinguished.

14 H. 8. 6 b.

As if there be lord and tenant, and the tenant maketh a lease for life, the remainder in fee, if the lord release to the tenant for life, the rent is wholly 'extinguished, and he in the remainder shall take benefit thereof; even so when the heir of a disseisor is disseised, and the disseisor make a lease for life, the remainder in fee, if the first disseisee release to the *tenant for life, this is said to enure by way of extinguishment, for that it shall enure to him in the remainder, who is a stranger to the release; and yet in truth the right is not extinct, but doth follow the possession, viz. the tenant for life hath it during his time, and he in the remainder to him and to his heirs, and the right of the inheritance is in him in the remainder; for a right to land cannot die or be extinct in deed; and therefore, if after the death of tenant for life, the heir of the disseisor bring a writ of right against him in the remainder, and he join the mise upon the

(a 2) For, the recovery being reversed, all estates subsequent to it are defeated, and the intruder is restored to the land in such plight as if there had been no recovery at all; and the feoffee cannot maintain an action on the naked right of his feoffor. Hawk. Abr. 374.—[Ed.]

(c 2) Supra, 266 a. p. 476—478. and see the notes there.—[Ed.]

(d 2) See ante, 66 a. vol. 1. p. 18. n. [10].—[Ed.]

mere right, it shall be found for him, because in judgment of law he hath by the said release the right of the first disseisee.

BUT releases which enure by way of extinguishment (1) against all persons, are where he, to whom the release is made, cannot have that which to him is released. As if there be lord and tenant, and the lord lease to the tenant all the right which he hath in the seignory, or all the right which he hath in the land, &c. this release goeth by way of extinguishment against all persons, because that the tenant cannot have (49) service to receive of himself. LITTLETON.
[Sect. 479.
279 b.]

IN the same manner is it of a release made to the tenant of the land of a rent-charge or common of pasture, &c. because the tenant cannot have that which to him is released, &c. so such releases shall enure (50) by way of extinguishment in all ways. LITTLETON.
[Sect. 480.
279 b.]

*ALSO, to prove that the grand assise ought to pass for the demandant, in the case aforesaid, I have often (51) heard the reading of the statute of West. 2. (which is the third chapter) which begun thus: In casu quo vir amisit per defaultum tenementum quod fuit jus uxoris suae, &c. that at the common law before (52) the said statute, if a lease were made (53) to a *man for term of life, the remainder over in fee, and a stranger by feigned action (feint is a particeps of the French word feindre, which is to feign or falsely pretend so as a feint action is a false action) recovered against the tenant for life by default, and after (54) the tenant dieth, he in the remainder had no remedy before the statute, because he had not any possession of the land.* LITTLETON.
[Sect. 481.
280 a.]
[COKE,
280 b.]
(483)*
[COKE,
280 b.]

"The remainder over in fee." Here is to be observed, that although the statute speaketh of a reversion (o), yet, by the authority of Littleton, a remainder is within the statute. 280 b.
(o) 24 E. 3. 36.
28 E. 3. 96.
18 E. 2. En-
trie, 74. 3 E.
2. Entrie, 7.
6 E. 3. 24. 7
E. 3. Entrie,
62. 7 E. 4. 54.
55. 15 E. 3. 15.
F. N. B. 217 d.
Register, 241.

See the statute of 14 Eliz. cap. 8. which provideth fully for him in the remainder (F 2).

(49) *service pour prender*—ceo, L. and M. and Roh.

(50) *per extinguishment en tous voyes,—touts foitz per voie d'extintissement envers tousz persons* L. and M. and Roh.

(51) *en* added L. and M. and Roh.

(52) *mesme* not in L. and M. nor Roh.

(53) *a un home*—al tenant, L. and M. and Roh.

(54) *le tenant*, not in L. and M. and Roh.

(1) Here Littleton returns to releases by extinguishment, see post, 268 a. [*Butler.*]

(F 2) By the common law, if a *præcipe* had been brought against a tenant for life, and a recovery suffered, it would have barred the persons in remainder; but this being justly considered as a grievance, a remedy was given by the statute of Westm. 2. c. 3. Further remedy was provided by the statute 32 H. 8. c. 31. which enacted, that all common recoveries suffered by tenants for life, without the consent of the persons in remainder or reversion, should be totally void. If, after this act, a tenant for life had made a lease for years, and the lessee had made a feoffment, and a *præcipe* had been brought against the feoffee, and he had vouched the tenant for life, such a recovery was not within the statute, because the tenant for life was not then seised of the estate for life. To remedy this, the

(p) W. 2. cap.
6. Vid. 34 E.
3. Formedon,
31. 11 E. 3.
Ibid. 31. 8 E.
3. 59. F. N. B.
217 d. 7 H. 7.
13.

(p) "*Had no remedy before the statute.*" Here it appeareth by Littleton, that if a man maketh a lease for life, the remainder in fee, and tenant for life suffereth a recovery by default, that he in the remainder should not have a *formedon* by the common law; for Littleton saith, that he hath not any remedy before the statute. Neither is there any such writ in that case in the Register, albeit in some books mention is made of such a writ.

(484)*
280 a.
(2 Inst. 345.)

*280 b.

"*I have often heard the reading of the statute of West. 2.*" Here it is to be observed, of what authority ancient lectures or readings upon statutes were, for that they had five excellent qualities. First, they declared what the common law was before the making of the statute, as here it appeareth. Secondly, they opened the true sense and meaning of the statute. Thirdly, their cases were brief, having at the most one point at the common law and another upon the statute. Fourthly, plain and perspicuous, for then the honour of the reader was to excel others in authorities, arguments, and reasons, for proof of his opinion, and for confutation of the objections against it. Fifthly, they read, to suppress subtle inventions to creep out of the statute. But now readings having lost the said former qualities, have lost also their former authorities: for now the cases are long, obscure and intricate, full of new conceits, like rather to riddles than lectures, which when they are opened they vanish away like smoke, and the readers are like to lapwings, who seem to be nearest their nests, when they are farthest from them, and all their study is to find nice evasions out of the statute. By the authority of Littleton, ancient readings may be cited for proof of the law; but new readings have not that honour, for that they are so obscure and dark.

LITTLETON.
[Sect. 482.
280 b.]

BUT if he in the remainder had entered upon the tenant for life and disseised him, and after the tenant enter upon him, and after the tenant for life by such recovery lose by default, and die, now he in the remainder may well have a writ of right against him which recovers, because the mise shall be joined only upon the mere right, &c. Yet in this case the seisin of him in the remainder was defeated by the entry of the tenant for life. But peradventure some will argue and say, that he shall not have a writ of right in this case, for that when the mise is joined, it is joined in this manner, scilicet, if the tenant hath more mere right in the land in the manner as he holdeth, than the deman-

statute 14 Eliz. c. 8. was passed, reciting, that several tenants in tail after possibility, and other tenants for life or lives, had suffered common recoveries, to the prejudice of those in remainder or reversion; it was therefore enacted, "that all such recoveries had or prosecuted by covin against any such particular tenant, or against any other, with voucher over of such particular tenant, should, as against all persons in remainder or reversion, be utterly void, and of no effect: provided that that act should not extend to recoveries by good title, or to recoveries by assent and agreement of the persons in remainder or reversion, so that such assent appeared of record in any of her majesty's courts. And it was thereby further enacted, that the statute 32 H. 8. should be repealed." In consequence of the last proviso in this statute, a tenant for life may join with the persons in remainder or reversion in suffering a common recovery, without incurring a forfeiture. *Wiseman v. Crow*, Cro. Eliz. 562. *Pigott*, 18. 83. 5 Cru. Dig. 398, 399.—[Ed.]

dant hath in the manner as he demandeth, and for that the seisin of the demandant was defeated by the entry of the tenant for term of life, &c. then he hath no right in the manner as he demandeth (g 2).

*Here a disseisin (A) gotten by wrong, and defeated by the entry of him that right hath, is sufficient to maintain a writ of right against the recoveror in this case, for albeit *the seisin is defeated between the lessee for life and him in the remainder, yet having regard to the recoveror, who is a mere stranger, and hath no title, it is sufficient against him. But otherwise it is against the party himself that defeated the seisin, and the law is propense to give remedy to him that right hath. And where some have thought, that there is no authority in law to warrant Littleton's opinion herein, they are greatly mistaken, for Littleton hath good warrant for all that he hath written.

(485)*

280 b.

38 E. 3. 3. ut.

Juris Utr. 1.

*281 a.

7 E. 3. 62. 38

E. 3. 37. tit.

Jur. Utr. 1.

(Ante, 315 a.)

Lands are letten to A. for life, the remainder to B. for life, the remainder to the right heirs of A.; A. dieth, B. entereth and dieth; a stranger intrudeth, the heir of A. shall have a writ of right of the seisin which A. had as tenant for life.

Lands are letten to A. and B., and to the heirs of A.; A. dieth, a recovery is had against B.; the heir of A. shall have a writ of right of the whole, for every joint-tenant is seised *per my et par tout*.

(Ante, 184 a.)

b.)

If lands be given in tail, the remainder to A. in fee, the donee dieth without issue, his wife *privement enseint*, A. entereth, the issue is born, and entereth upon him, and dieth without issue, A. shall have a writ of right of the seisin which he had.

If lands be given in tail to A., the remainder to his right heirs; A. dieth without issue, the collateral heir of A. shall have a writ of right of the seisin of A.

4 E. 3. 16, 17.

(g 2) Here Littleton, in support of his opinion, that, in the principal case the grand assise ought to pass for the heir of the alienee, puts the case of a person who had a remainder in fee expectant on an estate for life, at common law; the tenant for life lost by default in a feigned action, and died; he in the remainder, before the statute of Westm. 2. c. 3., had no remedy. But, if he had disseised the tenant for life before such recovery, and then the tenant for life had re-entered, and lost by default, the remainder-man might have had a writ of right against the recoveror; for though the seisin which he gained was defeated by the re-entry of the tenant for life, as to him, yet it was a good ground of a writ of right against the recoveror, who was a mere stranger. *Infra*, 280 b. And though the mise be joined in this manner, whether the tenant have more right as he holds than the demandant in the manner as he demands, and the seisin of the demandant were defeated, so that he has no right in the manner as he demands, yet he ought to recover; for these words *modo et forma* are mere form, where the issue is joined, as in this case, on the point of the action. *Infra*, 281 b.—[*Ed.*]

(A) Disseisin seems to be here printed by mistake instead of seisin; as it was the tortious seisin, which the remainder-man acquired by his disseisin of the tenant for life, that enabled him to defeat in a writ of right, the recovery by the default of the tenant for life. [Note from the 18th London Edition, 1823.]

(486)*
 (Ante, 14b.
 15a.)
 40 E. 3. 8.
 42 E. 3. 20.
 37 Ass. 4.
 24 E. 4. 24.
 7 H. 5. 4.
 11 H. 4. 11.

LITTLETON.
 [Sect. 483.
 281 a.]
 *281 b.

*And so note a diversity between a seisin to cause *possessio fratris*, &c. for there is required a more actual seisin, and a seisin to maintain a writ of right. And hereby also are the (&c.) in this section explained.

(Yelv. 148.
 Hob. 73. 106.)
 (6 Rep. 24.)

*TO this it may be said, that these words (modo et formâ prout, &c.) in so many cases are words *of form of pleading, and not words of substance. For if a man bring a writ of entry in casu proviso, of the alienation made by the tenant in dower to his disinheritance, and counteth of the alienation made in fee, and the tenant saith, that he did not alien in manner as the demandant hath declared, and upon this they are at issue, and it is found by verdict that the tenant aliened in tail, or for term of another man's life, the demandant shall recover; yet the alienation was not in manner as the demandant hath declared, &c. (н 2).*

LITTLETON.
 [Sect. 484.
 281 b.]

ALSO, if there be lord and tenant, and the tenant hold of the lord by fealty only, (55) and the lord distrain the tenant for rent, and the tenant bringeth a writ of trespass against his lord for his cattle so taken, and the lord plead that the tenant holds of him by fealty and certain rent, and for the rent behind he came to distrain, &c. and demand judgment of the writ brought against him, quare vi et armis, &c. and the other saith, that he doth not hold of him in the manner as he suppose, and upon this they are at issue, and it is found by verdict that he holdeth of him by fealty only; in this case the writ shall abate, and yet he doth not hold of him in the manner as the lord hath said. For the matter of the issue is, whether the tenant holdeth of him or no; for if he holdeth of him, although that the lord distrain the tenant for other services which he ought not to have, yet such writ of trespass quare vi et armis, &c. doth not lie against the lord, but shall abate.

LITTLETON.
 [Sect. 485.
 282 a.]
 (487)*.

*ALSO, (56) in a writ of trespass for battery, or for goods carried away, if the defendant plead not guilty, in manner *as the plaintiff suppose, and it is found that the defendant is guilty in another town, or at another day than the plaintiff supposes, yet he shall recover. And (57) so in (58) many other cases these words, viz. in manner as the demandant or the plaintiff hath supposed, do not make any (59) matter of substance of the issue; for in a writ of right, where the mise is joined upon the mere right, that is as much as to say, and to such effect, viz. whether the tenant or demandant hath more mere right to the thing in demand.*

(55) *et—si*, L. and M. and Roh.
 (56) *en—un*, L. and M. and Roh.
 (57) *issint*, not in L. and M. nor Roh.

(58) *molles*, added in L. and M. and Roh.
 (59) *matter—manner*, L. and M. and Roh.

(н 2) For the point of the writ is whether the tenant in dower aliened to the dishersion of the defendant. See ante, n. (e 2). p. 484, 485.—[Ed.]

ALSO, if a man be disseised, and the disseisor dieth seised, &c. and his son and heir is in by descent, and the disseisee enter upon the heir of the disseisor, which entry is a disseisin, &c. if the heir bring an assise, or a writ (60) of entry in nature of an assise, he shall recover.

LITTLETON.
[Sect. 486.
283 b.]

And the reason hereof is, for that in the writ of right mentioned in the next section, the charge of the grand assise upon their oath is upon the mere right, and not upon the possession.

283 b.

BUT if the heir bring a writ of right against the disseisee, he shall be barred, for that when the grand assise is sworn, their oath is upon the mere right, and not upon the possession. For if the heir of the disseisor (61) sue an assise of novel disseisin, or a writ of entry in nature of an assise, and recovers against the disseisee, and sueth execution, yet may the disseisee have a writ of entry in the per against him, for the disseisin made to him by his father, or he may have against the heir a writ of right.

LITTLETON.
[Sect. 487.
283 b.]

BUT if the heir ought to recover against the disseisee in the case aforesaid by a writ of right, then all his right should be clearly taken away, for that judgment final (the form whereof you shall see in the last section of this Chapter) shall be given against him, which should be against reason where the disseisee hath the more mere right.

LITTLETON.
[Sect. 488.
284 a.]
[COKE,
284 a.]

**"Which should be against reason."* Argumentum ab inconvenienti.

(488)*
284 a
Vid. sect. 87,
&c. (Post,
286 b.)

"For if the heir of the disseisor, &c." Here is a diversity to be observed concerning that which hath been said, when the possession shall draw the right of the land to it, and when not. And therefore when the possession is first, and then a right cometh thereunto, the entry of him that hath right to the possession shall gain also the right which, as before it appeareth in those cases there put, followeth the possession, and the right of possession draweth the right unto it; but when the right is first, and then the possession cometh to the right, albeit the possession be defeated (as here in Littleton's case it is by the heir of the disseisor), yet the right of the disseisee remaineth (1 2).

283 b.
(Ante, 266 a.)
6 E. 3. 7.

Vid. sect. 447.

AND know (my son) that in a writ of right, after the four knights have chosen the grand assise, then he hath no greater delay than in a writ of formedon, after the parties be at issue (or demurrer, which is an issue in law), &c. And if the mise be joined upon battail, then he hath lesser delay.

LITTLETON.
[Sect. 489.
284 a.]
[COKE,
284 a.]
(6 Rep. 104.)

(60) *de entre en nature de assise, il recovers.* section) not in L. and M. nor Roh. but in *Me si l'heire port* (the beginning of next both MSS.

(61) *suiet—porta*, L. and M. and Roh.

(1 2) See supra, 266 a. p. 478. n. (v 1).—[Ed.]

284 a. "Battail." See for this word in the last section of this Chapter (κ 2).
(Post, 294 b.)

274 a. There is a diversity between a release of part of the estate of a right, and between a release of a right in part of the land. And therefore Littleton (sect. 467.) saith, that a release of a right for a day or an hour is of as good force, as if he had released his right to him and his heirs (L 2). But if a man be disseised of two acres, he may release his right in one of them, and yet enter into the other.
Release de mitter le droit for an hour, is as good as if made in fee. Vid. 6 E. 3. 17. 12 E. 4. tit. Descent. F. 29. (Post, 292 a.)

274 b. There are two diversities: first, between the quantity of the estate in a right, and the quality thereof; for albeit the *disseisee cannot release part of the estate, as hath been said, yet may he release his right upon condition, as it appeareth by Littleton (sect. 467), (q) and it agreeth with our books.
But it may be made on condition. (489)*
(q) 4 E. 2. Release, 50. 43 Ass. 12. 17 Ass. 2. 31 Ass. 13. 21 H. 24.

Also here is another diversity between a right, whereof Littleton putteth his case, which is favoured in law, and a condition created by the party which is odious in law, for that it defeateth estates. And therefore if a condition be released upon condition, the release is good, and the condition void.

(6 Rep. 62 a. Post, 297 a. 300 b.)

Rot. Parl. 18 H. 6. num. 29 Ap. Gwilliam's case. 10 E. 3. cap. 2. 3 H. 7. f. 6.

What things may be done upon condition, is too large a matter to handle in this place, our author having treated of Conditions before: only to give a touch of some things omitted there, shall suffice. An express manumission of a villain cannot be upon condition, for once free in that case, and ever free; also on attornment to a grantee upon condition, the condition is void, because the grant is once settled. But this is to be understood of a condition subsequent, and not of a condition precedent; for in both those cases, the condition precedent is good (μ 2). But letters patents of denization made to an alien, may be either upon condition subsequent or precedent; and so may the king make a charter of pardon to a man of his life upon condition, as is above said.

LITTLETON. [Sect. 454. 268 a.]
2. Release d'extinguisher le droit. To whom to be made. Release of right of seignory by the lord to his tenant being disseised,

ALSO, if there be lord and tenant, and the tenant be disseised, and the lord releaseth to the disseisee all the right which he hath in the seignory or in the land; this release is good, and the seignory is extinct; and this is by reason of the privity which is between the lord and the disseisee. For if the beasts of the disseisee be taken, and of them the disseisee sueth a replevin against the lord, he shall compel the lord to avow upon him; for if he avow upon the disseisor, then upon the matter shown the avowry

(κ 2) As to the nature of a writ of right and the proceedings therein, see post, Chap. 59.—[Ed.]

(L 2) A disseisee cannot release part of his estate in the right, because he has no right to any estate but that whereof he was disseised; therefore he must release his right to that or none at all. Hawk. Abr. 366.—[Ed.]

(μ 2) For there is no attornment or manumission before it is performed. That attornment is not now necessary to a grant, see ante, Chap. 37.—[Ed.]

shall abate, for the disseisee is tenant to him in right and in law (N 2). is good in respect of privity.

Hereupon may be collected and observed two diversities; first, (490)
268 a.
Diversity herein between a rent-service, and a rent-charge; (3 Rep. 36 b.)
between a seignory or rent-service, and a rent-charge: for a seignory or rent-service may be released and extinguished to him that hath but a bare right in the land. And the reason hereof is, in respect of the privity between the lord and the tenant in right; for he is not only as tenant to the avowry, but if he die, his heir within age, he shall be in ward; and if of full age, he shall pay relief; and if he die without heir, the land shall escheat. But there is no such privity in case of a rent-charge, for there the charge only lieth upon the land.

The second diversity is between a seignory and a bare right to land; for a release of a bare right to land to one that hath but a bare right to land is void, as hath been said. But here in the case of our author, a release of a seignory to him that hath but a right, is good to extinguish the seignory. or a bare right to land. Vid. sect. 451.

"He shall compel the lord to avow upon him, &c." This is regularly true; but if the lord hath accepted services of the disseisor, then the disseisee cannot enforce the lord to avow upon him, though his beasts be taken, &c. (o 2). 20 H. 6. 9 b.
41 E. 3. 26.
48 E. 3. 30.
2 E. 4. 68.

If a man hath title to have a writ of escheat, if he accept homage or fealty of the tenant, he is barred of his writ of escheat; but if he accept rent of the tenant, that is no bar *to him, for it may be received by the hands of a bailiff. (r) But some do hold, that if there be lord and tenant, and the tenant be disseised, and the disseisee die without heir, the lord accepts rent by the hands of the disseisor, this is no bar to him. Contrary it is, if he avow for the rent in a court of record, or if he take a corporal service, as homage or fealty, 31 E. 1. Dis-
sent. 17. 26
E. 3. 72. 4 H.
6. 21. F.N.B.
144 b.
(491)*
(r) 7 E. 6. tit.
Escheat Br.
18.
(3 Rep. 22.
1 Rol. Abr.
316 b.)

(N 2) For although a person was disseised, he yet remained tenant in right to the lord, though the disseisor was the apparent tenant in possession; and the lord might, if he pleased, still avow upon his rightful tenant; for before the statute of *Quia emptores* the lord was not obliged to change the person of his tenant, *Stamf. Prerog.*; and he was not obliged, in consequence of that statute, to change his tenant, except in the case of lawful feoffments, and tender of arrears, and not in the case of disseisin. Therefore, in the case put by Littleton, if the lord avows upon the disseisor as his tenant, the disseisee shall reply, and show the special matter, how he was tenant and was disseised, and shall abate the lord's avowry, because the feudal contract has still a continuance between the lord and tenant, and the wrongful act of the disseisor shall not destroy it. 5 Co. 21. *Gilb. Ten.* 63, 64.—[Ed.]

(o 2) Where the lord had accepted rent from the disseisor, if he afterwards distrained his cattle for rent in arrear, the disseisor might have compelled the lord to avow upon him; for the lord could not, contrary to his own acceptance, traverse the title which he had thereby admitted. But it seems doubtful whether, if the disseisee, after such acceptance, had put his cattle upon the land, and the lord had distrained them, he could have compelled the lord to avow upon him; Lord Coke is here of opinion that he could not, because it is the tenant's own laches to let the disseisor continue till rent was thus due and accepted; but the 48 Ed. 3. 9. seems to the contrary, and that he ought to avow upon the disseisee, because when the tenant pleaded the disseisin, to compel the lord to avow upon him, it is strange that the lord, by his own act of acceptance, should maintain his avowry, and destroy the feudal contract. See *Gilb. Ten.* 64, 65.—[Ed.]

*268 b.

(a) 7 H. 4. 17.
3 R. 2. Enr.
Cong. 38.
2 H. 4. 8.
6 H. 7. 9. Vid.
sect. 536.

(c) 21 H. 8.
cap. 19. (Hob.
322.)

Lib. 9. fol. 136.
Ascough's
case.

27 H. 8. fol. 4.
32 H. 8. c. 2.
Lib. 9. fol. 36.
Bucknal's
case.

34 H. 8. Avow
rie. Br. 113.
27 H. 8. 4. &
30. Buck-
nal's case,
ubi supra.
(492)*

Lib. 9. fol. 22.
in case d'A-
vowrie.

44 E. 3. 23.
11 H. 7. 4.
21 H. 7. 46.
34 H. 6. 18.
16 E. 4. 10.
6 R. 2. Res-
couse, 11.
(Post, 161.)

for the disseisor is in by wrong; but if the lord accept the rent by the hands of the heir, of the disseisor, or of his feoffee, because they be in by title, this shall bar him of his escheat, which is to *be understood of a descent or feoffment, after the title of escheat accrued: (s) for if the disseisor make a feoffment in fee, or die seised, and after the disseisee die, without heir, then there is no escheat at all, because the lord hath a tenant in by title (p 2). And when Littleton wrote, the disseisee, in the case here put, should have compelled the lord to have avowed upon him, as Littleton holdeth. But now this is altered by a latter statute of (t) 21 H. 8. For whereas by fines, recoveries, grants, and secret feoffments, &c. made by tenants to persons unknown, the lords were put from knowledge of their tenants, upon whom by order of law they should make their avowry, &c. it is by that statute enacted, that if the lord shall distrain upon the lands and tenements holden, &c. that he may avow, &c. upon the same lands, &c. as in lands, &c. within his fee or seignory, &c. without naming of any person certain, and without making avowry upon a person certain. Upon which statute these four points are to be observed. First, that the lord hath still election either to avow according to the common law, by force of the statute, by reason of this word, (*may*). Secondly, albeit the purview of the act be general, yet all necessary incidents are to be supplied, and the scope and end of the act to be taken; and therefore, though he need not to make his avowry upon any person certain, yet he must allege seisin by the hands of some tenant in certain, within forty years. Thirdly, that if the avowry be made according to the statute, every plaintiff in the replevin, or second deliverance, be he termor or other, *may have every answer to the avowry that is sufficient; and also have aid, and every other advantage in law (disclaimer only except); for disclaim he cannot, because in that case the avowry is made upon no certain person. Fourthly, where the words of the statute be, if the lord distrain upon the lands and tenements holden, yet if the lord come to distrain, and the tenant enchain his beasts which were within the view out of the land holden, and there the lord distrain, albeit the distress be taken out of his fee and seignory in that case, yet it is within the said statute; for in judgment of law the distress is lawful, and as taken within his fee and seignory; and this statute being made to suppress fraud, is to be taken by equity (q 2).

LITTLETON.
[Sect. 455.
268 b.]
Release of
right by the
donor to donee
in tail,
&c. being dis-
seised, is

ALSO, if land be given to a man in tail, reserving to the donor and to his heirs a certain rent, if the donee be disseised, and after the donor release to the donee and his heirs all the right which he hath in the land, and after the donee enter into the land upon the disseisor; in this case the rent is gone, for that the disseisee at the time of the release made, was tenant in right and in

(p 2) Where the disseisor died seised, his heir came in by title, and the disseisee, having lost the right of possession, could not put his cattle on the ground, and therefore he could not compel the lord to avow upon him; but the lord was bound to take the heir who had such right of possession to be his rightful tenant. Gilb. Ten. 65, 66.—[Ed.]

(q 2) See 4 Reev. Hist. 238. Ld. Raym. 257. Gilb. Distr. 189. Post, 161 a.—[Ed.]

law to the donor, and the avowry of fine (62) force ought to be made upon him by the donor for the rent behind, &c. But yet nothing of the right of the lands, (scilicet) of the reversion (63) shall pass by such release, for that the donee to whom the release is made, then had nothing in the land but only a right, and so the right of the land could not (64) then pass to the donee by such release.

good to extinguish the rent.

“*If the donee be disseised, &c.*” This is evident by that which hath been said. But admit that the donee maketh a feoffment in fee, and the donor release unto him and his heirs all the right in the land, this shall extinguish the rent, because the lord must avow upon him, and yet the tenant in tail after the feoffment hath no right in the land. But the reason is in respect of the privity, and that the (u) donor is by necessity compellable to avow upon him only; for if he should avow *upon the discontinuee, then it should appear of his own showing, that the reversion, whereunto the rent is incident, should be out of him, and consequently the avowry should abate; and so was it (w) resolved Trin. 18 Eliz. in the court of common pleas in Sir Thomas Wiat’s case, which I heard and observed. And Littleton saith here, that in case of the disseisin of fine force, the avowry must be made upon the donee.

*269 a.
So if made to donee in tail after a discontinuance by him.
Vid. sect. 464.
1 H. 5. ut. Grant, 43. 14 H. 4. 38. lib. 3. fol. 29. lib. 6. 58. Lampet’s case, ubi supra.
(Ante, 46. Post, 343.)
(w) 10 E. 3. 26. 48 E. 3. 8b. 31 E. 3. Gard. 116. 5 E. 4. 3. 7 E. 4. 27. 15 E. 4. 13. (493)*
(w) Trin. 18 Eliz. Sir Th. Wiat’s case. In Communi Banco.

“*Yet nothing of the right, &c. of the reversion, &c.*” Here the diversity aforesaid between the rent-service and a bare right to the land appeareth.

IN the same manner it is, if a lease be made (65) to one for term of life, reserving to the lessor and to his heirs a certain rent, if the lessee be disseised, and after the lessor release to the lessee and to his heirs all the right which he hath in the land, and after the lessee entereth, albeit in this case the rent is extinct, yet nothing of the right of the reversion shall pass (R 2), causâ quâ supra.

LITTLETON. [Sect. 456. 269 a.]
So a release to lessee for life, after a disseisin, enures to extinguish the rent: though it cannot enure by way of enlargement.
269 a.

Hereby the diversity is made apparent between a release of a rent-service out of land, and a release of right to land, in this section.

BUT if there be very lord and very tenant, and the tenant maketh a feoffment in fee, the which feoffee doth never become tenant to the lord (66), if the lord release to the feoffor all his right, &c. this release is altogether void, because the feoffor hath

LITTLETON. [Sect. 457. 269 a.]
Release of right of seignory by the

(62) i. e. of necessity.

(63) *adonques ne*, added L. and M. and Rob.

(64) *adonques*, not in L. and M.

(65) *fait* added in L. and M. and Roh.

(66) *&c.* added in L. and M. and Roh.

(R 2) In this case the release enures to extinguish the rent, because of the privity of contract, for the rent is payable notwithstanding the disseisin, since there is not any eviction under an elder title: but the disseisin of the lessee is a disseisin of the lessor, so that the lessor has no estate to grant, nor the lessee any estate capable of enlargement. 2 Prest. Conv. 313.—[Ed.]

lord to very
tenant after
feoffment in
fee by him is
void.

no right in the land, and he is not tenant in right to the lord, but only tenant as to make the avowry, and he shall never compel the lord to avow upon him, for the lord shall avow upon the feoffee if he will.

269 a. "Very lord and very tenant." This is to be understood of a lord in fee simple, and of a tenant of like estate.

*(494)
Vid. As-
cough's case.
Lib. 9. fol. 135.
136. 20 H. 6.
9. 2 H. 4. 24.
12 E. 4. 2.
26 H. 6. Avow-
rie, 17. 9 E.
Dyer, 267. 5
H. 7. 11. 7 E.
4. 24. 20 E. 3.
Avow. 131.
(9 Rep. 136 b.
21 H. 8. c. 19.)
*269 b.
47 E. 3. fol. ul-
timo. 38 H. 6.
23. (Doc. Pla.
53.) 21 H. 8.
c. 28. (Post,
345.)

*There be four manner of avowries for rents and services, &c. viz. 1. *Super verum tenentem*, as in the case here put. 2. *Super verum tenentem in forma prædictâ*, as where a lease for life, or a gift in tail be made the remainder in fee. 3. Upon one as upon his tenant by the manor, omitting (*very*); and this is when the lord hath a particular estate in the seignory, and so shall the donor *upon the donee, or lessor upon the lessee. 4. *Sur le matter en la terre* as within his fee and seignory. As where the tenant by knight-service maketh a lease for life reserving a rent, and die, his heir within age, the guardian shall avow upon the lessee, *scilicet super materiam prædictam in terris et tenementis prædictis ut infra feodum et dominium suum*. Now by the statute the very lord may avow, as in lands within his fee and seignory, without avowing upon any person in certain (1).

Here appeareth the diversity between a tenant in tail, and a tenant in fee-simple; for albeit tenant in tail make a feoffment in fee, yet the right of the intail remains, and shall descend to the issue in tail (s 2). But when the tenant in fee-simple make a feoffment in fee, no right at all remains of his estate, but the whole is transferred to the feoffee.

Also the lord is not compellable in that case to avow upon the feoffor; but if he will, as Littleton here saith, he may avow on the feoffee; but so it is not, as hath been said, in case of tenant in tail.

Note a diversity between actions and acts which concern the right, and actions and acts which concern the possession only. For a writ of customs and services lieth not against the feoffor, nor a release to him shall extinguish the seignory. So if a rescous be made, an assise shall not lie against the feoffor, and him that made the rescous, because the feoffee is tenant (τ 2), and in assise, the

(1) On the continuance of the entail in the tenant in tail after a feoffment made by him. see the case of *Lord Sheffield v. Ratcliffe*, Hob. 334, and see *Duncombe v. Wingfield*, *ibid.* 254.—[Butler, Note 223.]

(s 2) That when the tenant in tail makes a feoffment the right of the intail remains, and shall descend to the issue; but when a tenant in fee-simple makes a feoffment in fee, no right remains in him but the whole, since the stat. *Quia emptores*, is transferred to the feoffee, see acc. Hob. 252. 334. Watk. Gilb. Ten. 85. 133. 391.—[Ed.]

(τ 2) If the lord distrained for rent, and a rescous was made, an assise did not lie against the feoffor and the rescuer, because the feoffee is tenant, and the distress was taken, and the violence done to the lord on land in his possession, and an assise for rent is not so merely possessory as an avowry; for if the lord had been seised of more rent than of right was due by incroachment on the tenant, he could not recover in assise more than was due, but he might in an avowry. F. N. B. 10. G. Hawk. Abr. 360.—[Ed.]

surplusage encroached shall be *avoided. For these actions and acts concern the right; but of a seisin and an avowry which concern the possession, it is otherwise. And if the lord release to the feoffor, this is good between them, as to the possession and discharge of the arrearages, but the feoffee shall not take benefit of it, for that, as hath been said, it extendeth not to the right. But the feoffor shall plead a release to the feoffee, for thereby the seignory is extinct: as if lessee for life doth waste, and grant over his estate, and the lessor release to the grantee, in an action of waste against the lessee, he shall plead the release, and yet he hath nothing in the land. And so in waste shall tenant in dower or by the curtesy in the like case, and the vouchee, and the tenant in a *præcipe* after a feoffment made. And so in a *contra formam collationis* (v 2).

"The which feoffee doth never become tenant." *Nota* here an excellent point of learning, viz. if there be lord and tenant, and the rent is behind by divers years, and the tenant make a feoffment in fee, if the lord accept the service or rent of the feoffee due in his time, he shall lose the arrearages due in the time of the feoffor; for after such acceptance he shall not avow upon the feoffor, nor upon the feoffee, for the arrearages incurred in the time of the feoffor. But in that case, if the feoffor dieth, albeit the lord accept the rent or service by the hand of the feoffee due in his time, he shall not lose the arrearages, for now the law compelleth him to avow upon the feoffee (w 2), and that which the law compelleth him unto, shall not prejudice him.

4 E. 3. 22. 7
E. 3. 8. 7 E.
4. 27. 29 H. 8.
ut. Avowrie.
Br. 111. lib. 3.
fol. 65. 66.
Pennant's
case. 7 H. 4.
14. 2 E. 4. 6.
34 H. 6. 46.
37 H. 6. 29 H.
8. Avowrie.
(6 Rep. 56 b.)

*So it is, and for the same reason, if there be lord, mesne, and tenant, and the rent due by the mesne is behind, and after the tenant

(v 2) And the reason is, because, in these cases, the demandant cannot recover, without avoiding his own release.—[*Ed.*]

(w 2) In illustration of this doctrine, Lord Ch. B. Gilbert observes, that before the statute of *Quia emptores*, if a man had aliened, the feud was forfeited, though afterwards that was compounded for fines; and because the tenant had sworn fealty, he could not withdraw himself out of the feudal service during life; but after the death of the feoffor, the lord was empowered to take the feoffee for his tenant, for the lord could not introduce the heir into the feud, contrary to the alienation of the ancestor. And after the statute of *Quia emptores*, the lord could avow upon the feoffor till the arrears were tendered; but both before and after the statute, by acceptance of the feoffee, he became his tenant; for it was a plain consent to the alienation. So in terms for years, if a termor assigns, and the landlord accepts rent from the assignee, he can have no action from the termor, because the rent is a service, which being taken from the assignee, establishes him in the term, and he cannot demand the service but from the tenant of the land; but where there is no such acceptance, if the termor assigns in his life-time, or the executor after his decease, yet an action of debt lies for the rent against the executor; for a term for years being the smallest estate, is presumed to continue in person, and the contract is supposed to be performed by that person, unless he accept another tenant; and that person has a continuance to perform all contracts as long as there is an executor that represents him, and has assets to perform his contracts. 5 Co. 24. 1 Sid. 366. But a man may have an action of covenant on the covenants in the lease, after the acceptance of the assignee for his tenant; because though the acceptance discharges the tenant from the action of debt, since it discharges the service by accepting another, yet without legal words and a solemn contract in writing the covenant cannot be discharged; for *solvetur eo ligamine quo ligatum est*. Cro. Jac. 309. 522. Cro. Car. 188. 465—470. 1 Saund. 240, 241. 2 Saund. 302. *Auriot v. Mills*, 4 T. R. 94. Gilb. Ten. 67, 68. Ante, p. 330, 331, n. (e 3).—[*Ed.*]

forejudge the mesne, and the lord receive the services of the mesne which issue out of the tenancy, he shall not be barred of the arrearages which issue out of the mesnalty; and so if the rent be behind, and the tenant dieth, the acceptance of the services by the hand of the heir shall not bar him of the arrearages; for in these cases, albeit the persons be altered, yet the lord doth accept the services of him which only ought to do them.

4 E. 3. 22.
47 E. 2. 4.

But as long as the feoffor liveth, the lord shall not be compelled to avow upon the feoffee, unless he giveth the lord notice, and tender unto him all the arrearages.

21 H. 8. c. 1.

But now by the statute the lord may avow upon the lands so holden, as in lands within his fee or seignory, without naming of any person certain to be tenant of the same, and without making of any avowry upon any person certain, as hath been said, which hath much altered the common law in the cases above said, for the benefit and safety of the lord.

But yet these cases are necessary to be known (for which purpose I have added them), for that the lord may avow still at the common law if he will.

LITTLETON.
[Sect. 458.
270 a.]
(497)*
(Ante, 76 b.)
Reason of the
diversity be-
tween this
case and that
of a release to
very tenant
being disseis-
ed.

*OTHERWISE it is where the very tenant is disseised, as in the case aforesaid: for if the very tenant who is disseised, hold of the lord by knight-service and dieth (his heir *being within age), the lord shall have and seise the wardship of the heir, and so shall he not have the ward of the feoffor that made the feoffment in fee, &c. (x 2), so there is a great diversity between these two cases.*

270 a.

Of this sufficient hath been said before.

12 H. 4. 13.
36 E. 3. tit.
Gard. 10. 6 H.
7. 9. 37 H. 6.
1. 32 H. 6. 27.
7 E. 6. tit.
Gard. Br.
(Post, 345 b.)

279 b.

How a re-
lease by way
of extinguish-
ment shall
enure.
14 H. 8. fol. 5.
6. 11 H. 7. 25.
20 H. 6. tit.
Barre, 39.
38 E. 3. 10.

Littleton (sect. 479.) putteth a diversity between releases which enure by way of extinguishment against all persons, and whereof all persons may take advantage, and releases which in respect of some persons enure by way of extinguishment, and of other persons by way of *mitter le droit*; or between releases which in deed enure by extinguishment, for that he to whom the release is made cannot have the thing released; and releases which, having some quality of such releases, are said to enure by way of extinguishment, but, in troth, do not; for that he to whom the release is made may receive and take the thing released. And Littleton putteth cases where releases do absolutely enure by extinguishment, without exception, having respect to all persons. And first of the lord and tenant; secondly, of the rent-charge; thirdly, of the common of pasture.

*280 a.
On release of
right of sei-
gnory by the
lord to his

First, of the lord and tenant, and the lord release to the tenant his seignory, *this must, of necessity, enure by way of extinguishment to all men; for the tenant cannot have service to be taken of him-

(x 2) See ante, 76 b. vol. 1. p. 299. and n. (e) there, and Gilb. Ten. 65.—[Ed.]

self, nor one man can be both lord and tenant. The second is of a rent-charge; a man cannot have land and a rent issuing out of the same land. Thirdly, a man cannot have land and a common of pasture issuing out of the same land, *et sic de cæteris*. For in all these cases, and the like, he to whom the release is made cannot have and enjoy the thing that is released. But in the case of the right of the land, the tenant of the land may take and enjoy it for strengthening his estate therein.

If two tenants in common of land, grant a rent-charge of 40s. out of the same to one in fee, and the grantee release to one of them, this shall extinguish but twenty shillings, for *that the grant in judgment of law was several (1). So it is, if two men be seised of several acres, and grant a rent *ut supra*. But there is a diversity between several estates in several lands, and several estates in one land; for if one be tenant for life of lands, the reversion in fee over to another, if they two join in a grant of a rent out of the lands, if the grantee releaseth either to him in the reversion, or to tenant for life, the whole rent is extinguished, for it is but one rent, and issueth out of both estates, and so note the diversity (2).

The mesne being a feme, intermarry with the tenant peravail, if the lord release to the feme, the seignory only is extinct; but if he release to the husband, both seignory and mesnalty are extinct. And in this case, if the lord release to the husband and wife, it is a question how the release shall enure; but it is no question but that a release may be made to a mesnalty, or a seignory, suspended in part of the estate.

But here observe a diversity where a release enureth by way of extinguishment of an inheritance, which is in possession, and may be granted over, and a release of a right, or an action to lands which cannot be granted over.

(x) For the lord may release his seignory to the tenant of the land for life or in tail, *et sic de cæteris*. But so cannot one release a right or an action; for if it be released but for an hour, it is extinct for ever, as hath been said.

And two things are to be observed here; first, that by the release of all the right in the land the seignory is extinct, as well as by the release of all the right in the seignory, for the seignory issueth out of the land. Secondly, that by the release of all his right in the seignory or the land, the whole seignory is extinct without any words of inheritance. If the tenancy be given to a lord and to a

tenant, the seignory is extinct as to all persons. On release of rent-charge, common of pasture, &c. to the terre-tenant, the rent-charge, &c. is extinct as to all persons. (2 Rol. Abr. 406.)

267 b.
(2 Rol. Abr. 414. Ante, 275 a., 279 b. Post, 285 b. 297 a. Ante, 147 b. 197.) (498)*

So if made to him in reversion, in case of a joint grant of rent-charge by the reversioner, and the particular tenant. (1 Rep. Mayoe's case.) Diversity herein between several estates in several lands, and several estates in one land.

280 a.
Release by way of extinguishment may be made to one whose estate is suspended. (Post, 273 b.) May be made for part of the estate.

(274 a. 1 Rol. Abr. 412.) (Ante, 214 a. 232 b. 266 a.) Secus as to a release de mitter le droit. (s) 13 E. 3. tit. Extinguishment. Brooke 45 et tit. Voucher. F. 120. 30 E. 3. 13. 19 H. 6. 19. 21 E. 3. 33. 35 Ass. 17. 11 H. 4. tit. Release. 21. 18 F. 2. ibid. 5. 26 H. 8. 5. 41 Ass. 6.

(1) If they grant a rent-charge of 20s. which in law amounts to a rent-charge of 40s. as two grants, for otherwise non est casus. When two tenants in common grant a rent, that is, several estates in one land, and yet they are several grants, therefore quære of this diversity. *Plowd. Qu. pl. 315. contra.*—Lord Nott. MSS. [Butler, Note 220.]

(2) "For *Plowden*, in his *Quære 315*, if tenant for life grants rent, and the grantee purchases the reversion, the rent remains during the life of the tenant for life."—Lord Nott. MSS. [Butler, Note 221.]

Words of inheritance not necessary to a release d'extinguish-er le droit. (490)*

stranger, and to the heirs of the stranger, the lord release to his companion all the right in the land, this release doth not only pass his estate in the tenancy, *but extinguisheth also his right in the seignory, and so one release enures to extinguish several rights in one and the same land.

Secus as to releases by way of enlargement.

(Ante, 152 b. Mo. 59.)

If there be lord and tenant by fealty and rent, the lord granteth the seignory for years, and the tenant attorneth, the lord releaseth his seignory to the tenant for years and to the tenant of the land generally, the whole seignory is extinct, and the state of the lessee also (y 2). But if the release had been to them and their heirs, then the lessee had the inheritance of the one moiety, and the other moiety had been extinct. And the reason of this diversity is, because when the release is made generally, it can enure to the lessee but for life, because it enureth by way of enlargement of estate, and being made to the tenant of the land, it enureth by way of extinguishment, as Littleton (sect. 479.) saith, and then there cannot remain a particular estate in the seignory for life. But when the release is made to them and their heirs, each one takes a moiety, the one by way of increasing of the state, and the other by extinguishment.

272 b.

3. Release d'enlargir l'estate.
To whom to be made.
Fleta, lib. 5. cap. 34. 15 H. 7. 14. 21 E.
4. 4. Release must be in privy to the releasor.
(Post, 296 a.).
*273 a.

It is a certain rule, that when a release doth enure by way of enlarging of an estate, that there must be privy of estate, as between lessor and lessee, donor and donee. For if A. make a lease to B. for life, and the *lessee maketh a lease for years, and after A. releaseth to the lessee for years, and his heirs, this release is void to enlarge the estate, because there is no privy between A. and the lessee for years (z 2).

(y 2) For, as to the tenant of the land, the release enures by way of extinguishment of the seignory, which requires no words of inheritance, but the estate of the grantee for years, in the seignory, can only be enlarged for life for want of words of inheritance; and therefore it shall be extinct; for it is a maxim of law, that where the fee of a seignory is extinct, there can no longer remain a particular estate in that seignory; because every particular estate implies a tenure or attendance over, which is, in this case, expressly negated. Ante, 152 b. vol. 1. p. 484. 312 b. vol. 2. p. 370. 9 Co. 134 b.; and see Mr. Ritso's Intr. p. 187—189.—[Ed.]

(z 2) Releases enure by way of enlargement of estate, when the possession and inheritance are separated for a particular time; and he who has the reversion and inheritance, releases all his right and interest in the lands to the person who has the particular estate: such releases are said to enure by way of enlargement, and to be equal to an entry and feoffment, and to amount to a grant and attornment; for the tenant's accepting the grant is an attornment; and acceptance and consent are presumed to a grant made to himself, unless the contrary appears. That a release may operate as an enlargement of an estate, three circumstances are requisite: 1st. That the releasee should have a *vested* estate. 2d. That the releasor should have a *vested* estate in reversion or remainder, expectant mediately or immediately on the estate of the releasee. 3dly. That there should be a *privy of estate* between the releasor and the releasee. It will fully appear from the instances to be presently considered, that it is not sufficient that the releasee should have a mere inchoate executory interest, as an *interesse termini*, or a contingent remainder, or any other executory interest, as an interest depending on an executory devise, infra, sect. 459. p. 501; nor is it sufficient that he should have a *mere right*, or title of entry, as a lessee for life, after he has been disseised, or as a lessee for years, after he has been ousted, and while his interest remains a mere right or title of entry. Supra, Sect. 456. p. 493. On the contrary, it is necessary that the releasor and releasee should stand in the relation to each other, either of lessor and lessee, or in the relation of a particular tenant and remainder-man, or particular

If a man make a lease for twenty years, and the lessee make a lease for ten years, if the first lessor doth release to the second lessee, and his heirs, this release is void for the cause aforesaid. (500)
(Post, 270 a.)

For the same cause, if the donee in tail make a lease for his own life, and the donor release to the lessee and his heirs, this release is void to enlarge the estate.

And as privity is necessary in this case, so privity only is not sufficient. As if an infant make a lease for life, and the lessee granteth over his estate with warranty, the infant at full age bringeth a *dum fuit infra ætatem*, the tenant voucheth his grantor, who entereth into warranty, the demandant releaseth to him and his heirs; here is privity in law, and a tenancy in supposition of law: and yet because he *in rei veritate* hath no estate, it cannot enure to him by way of enlargement; for how can his estate be enlarged that hath not any?

And have an actual estate to be enlarged. (Ante, 264 a. Post, 255 b.) Sect. 490, 491.)

A tenant merely in supposition of law, is not capable of a release d'enlargir.

If a tenant by the curtesy grant over his estate, yet he is tenant as to an action of waste, attornment, &c. and yet a release to him and his heirs cannot enure to enlarge his estate, that hath no estate at all. (501)
(Ante, 53 a. 54 a.)

But if a man make a lease for years, the remainder for life, a release by the lessor to the lessee for years, and to his heirs, is good, for that he hath both a privity and an estate (A 3); and the release also to him in the remainder for life and his heirs, is good also. (2 Rol. Abr. 400.)

If I grant the reversion of my tenant for life, to another for life, now shall not I have an action of waste: (1) but if I release to the grantee for life, and his heirs, now he *hath the fee-simple, and shall punish the waste done after (2).

48 E. 3. 16 a. per Porsay at Finchden. 41 E. 3. 17 a. 7 E. 4. 17. (Post, 54 a.) *273 b.

tenant and reversioner, so that there may be a *privity* of tenure between them. The lessor may enlarge the estate of his lessee; and for all the purposes of this doctrine the assignee or representative of the lessee stands in the place of the lessee; and the assignee or representative, whether *heir* or *devisee*, of the reversioner, stands in the place of the reversioner; and the ability of making, and capacity of receiving such enlargement continues, although the lessee, &c. or his assignee, create a particular estate, derived out of his own estate; and although the reversioner create a particular estate, which is interposed between the interest of the particular tenant and the reversion; for, notwithstanding such particular estates, there is a continuing privity between the lessee or his assignee on the one hand, and the reversioner or his assignee on the other hand; and yet, as appears here, an estate created out of a particular estate, is not, *during such particular estate*, capable of enlargement by release of the remainder or reversion, expectant on such particular estate. This is from the want of privity. The material rule of law applicable to this subject, seems to be, that the particular estates, the remainder, and the reversion, are parts of the same estate. There is a connexion between the tenants of these estates, as having interests depending on one and the same seisin. 2 Bl. Com. 164. *Goodright v. Forrester*, 1 Taunt. 602. 2 Prest. Conv. 324—326. Gilb. Ten. 70, 71.—[Ed.]

(A 3) And the tenant for years in this case holds of the reversioner, and pays him the services, and ought to attorn to his grants. Ante, 316 b. p. 385. n. (D 1). Gilb. Ten. 71.—[Ed.]

(1) Because no person is entitled to an action of waste, but he who has an estate intermediate in remainder or reversion, expectant on the estate of the person committing waste. See ante, n. 2. to 218 b. [Butler, Note 234.]

(2) By the release the tenant for life in reversion, obtains the immediate reversion in fee. [Butler, Note 235.]

16 H. 6. Re-
lease, 45. 22
E. 2. Release.
Statham.
(y) 13 H. 4. 6.
Stam. prer. 7
b. 18 E. 4. 5.
22 Ass. 12.
11 H. 7. 12.
10 H. 6. 11.
(Post, 299 a.)
LITTLETON.
[Sect. 459.
270 a.]
So lessee for
years, before
entry, having
but an inter-
esse termini
is not capable
of a release
by way of en-
largement:
[COKE,
70 b.]
Pl. Com. 423.
(502)*

If a feme covert be tenant for life, a release to the husband and his heirs is good, for there is both privity and an estate in the husband, whereupon the release may sufficiently enure by way of enlargement; (y) for by the intermarriage he gaineth a freehold in his wife's right.

ALSO, if a man letteth to another his land for term of years, if the lessor release to the lessee all his right, &c. before that the lessee had entered into the same land by force of the same lease, such release is void; for that the lessee had not possession in the land at the time of the release made, but only a right (which is not so to be understood that he hath but a naked right, for then he could not grant it over; but seeing he hath *interesse termini* before entry, he may grant it over, albeit, for want of an actual possession, he is not capable of a release to enlarge his estate,) *to have the same land *by force of the lease. But if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heir, is (69) sufficient to him, by reason of the privity which by force of the lease is between them, &c.*

270 a.
49 E. 3. 28.
32 H. 6. 8.
37 H. 6. 18.
22 E. 4. 37.
4 H. 7. 10.
15 H. 7. 14.
secus as to
lessee for
years in pos-
session, after
an under-
lease by him;
22 E. 4. Sur-
render, 6.
(Ante, 273 a.)
or as to les-
see for years
in remainder,
after entry by
the first les-
see.

"Before that the lessee had entered, &c." For before entry the lessee hath but *interesse termini*, an interest of a term, and no possession, and therefore a release which enures by way of enlarging of an estate cannot work without a possession, for before possession there is no reversion (p 3); and yet if a tenant for twenty years in possession make a lease to B. for five years, and B. enter, a release to the first lessee is good, for he had an actual possession, and the possession of his lessee is his possession. And so it is if a man make a lease for years, the remainder for years, and the first lessee doth enter, a release to him in the remainder for years is good to enlarge his estate (z 3).

(69) *bon et* added in L. and M. and Roh.

(p 3) But though this be true in the case of a lease at the common law, yet where it is created by a bargain and sale, under the Statute of Uses, there is no need of an actual entry to make the lessee capable of a release; for by virtue of the statute he shall be adjudged to be in actual possession, that is; to have a vested estate. At the common law the lessee had not any estate till entry: under the bargain and sale he has an estate immediately on the execution of the bargain and sale, and before entry, provided the bargain and sale is to hold from a day past, or from the execution. But it seems that the bargainee cannot maintain an action of trespass, or be considered as in the actual possession of the land, until he has entered by virtue of the bargain and sale, 2 Prest. Conv. 390, 391. Ante, p. 461. n. (q). *Barker v. Keate*, 2 Mod. 249. Cro. Car. 110. 2 Vent. 35.—[Ed.]

(z 3) It appears here, that an estate is capable of enlargement, although it is a reversion or remainder, and consequently does not confer a right to the immediate possession. Et vid. Shep. Touch. 322. Shep. Abr. 137. Formerly, it seems to have been considered that a release could not operate by way of enlargement, unless there was an estate accompanied with *actual possession*, and not merely a *vested estate* giving a present right of present or future enjoyment. But it is now clearly settled, that a conveyance by lease and release is equally applicable to estates in possession, and to estates in reversion or remainder. See 2 Prest. Conv. 232.—[Ed.]

But if a man make a lease for years to begin presently, reserving a rent, if, before the lessee doth enter, the lessor releaseth all the right that he hath in the land, albeit this release cannot enlarge his estate, yet it shall in respect of the privity extinguish the rent. And so it is, if a lease be made to begin at Michaelmas, reserving a rent, and before the day the lessor release all the right that he hath in the land, this *cannot enure to *enlarge the estate but to extinguish the rent in respect of the privity, as it was resolved (z) in the Exchequer, which I observed.

Diversity between a release d'enlargir l'estate, and a release de mitter le droit, to lessee for years before entry.
(Ante, 46 b.)
(503)*
*270 b.

A man granteth the next avoidance of an advowson to two, the one of them may before the church become void release to the other; for although the grantor cannot release to them to increase their estate, because their interest is future, and not in possession, yet one of them to extinguish his interest may release to the other, in respect of the privity. But after the church become void, then such a release is void, because then it is (as it were) but a thing in action. And this was resolved (a) by the whole court of common pleas, which I myself heard and observed. And by consequent in the case of Littleton, if a lease for years be made to two, albeit the lessor before they enter cannot release to them to enlarge their estate, yet one of them may before entry release to the other.

(z) Mich. 39 & 40 Eliz. in Scaccario, between Sir Henrie Woodhouse and Sir William Paston.

(a) Pasch. 39 Eliz. in quare impedit per Bennet, vers l'evêque de Norwich in communi banco.

"But if the lessee enter into the land, &c." This is evident. And herein note a diversity between a lease for life, and for years, for before the lessee for years enter, a release cannot be made unto him: but if a man make a lease for life, the remainder for life, and the first lessee dieth, a release to him in the remainder, and to his heirs, is good before he doth enter to enlarge his estate, for that he hath an estate of a freehold in law in him, which may be enlarged by release before entry.

Release d'enlargir to tenant for life, before entry, is good.

And where our author speaketh only of a lessee for years, the same law it is of a tenant by statute-merchant or staple, or tenant by *elegit*, or the like (f 3).

Release d'enlargir may be made to tenant by statute-merchant, &c.; 25 E. 3. 63. 31 E. 3. Confirmat. 14. 31 Ass. pl. 13. LITTLETON. [Sect. 460. 270 b.] or to tenant at will; (504)*

**IN the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will, by force of which lease the lessee hath possession; if the lessor in this case make a release to the lessee of all his right, &c. this release is good enough, for the privity which is between them; for it shall be in vain to make an estate by a livery of seisin to another, where*

(f 3) It has been doubted, whether the estate of tenant by statute merchant, statute staple, and *elegit*, admits of enlargement by release; and it is said, that to make releases operate in this manner, it is necessary that the releasee, at the time the release is made, should be in the actual possession of, or should have a vested interest in the lands intended to be released; that there should be a privity between him and the releasor, and that the possession of the releasee should be notorious. But, on a full consideration of the subject, it will be found, that not any one of these qualifications is wanting in a tenant by statute or *elegit*. And therefore the better opinion seems to be, agreeably to what is here said by Lord Coke, that such estates are capable of enlargement. See 2 Prest. Conv. 297. 302.—[Ed.]

he hath possession of the same land by the lease of the same man before, &c. (G 3).

But the contrary is holden, Pasch, 2 E. 4. by all the justices (70).

270 b. "But the contrary is holden, &c." This is of a new addition, and the book here cited ill understood, for it is to be understood of a tenant at sufferance.

LITTLETON.
[Sect. 461.
271 a.]

secus as to a
mere tres-
passer;

BUT where a man of his own head occupieth lands or tenements at the will of him which hath (71) the freehold, and such occupier claimeth nothing but at will, &c. if he which hath the freehold will release all his right to the occupier, &c. this release is void, because there is no privity between them by the (H 3) lease made to the occupier, nor by other manner, &c. (I 3).

271 a.
Vide sect. 68.
(1 Rol. Abr.
658. Ant. 57.
Cro. Car. 303.
(505) *

"Of his own head occupieth." He doth not say, of his own head entereth, &c. so as this is to be understood of a *tenant at sufferance (K 3), viz. where a man cometh to the possession first lawfully, and holdeth over.

(70) This paragraph is not in L. and M. (71) *ent*, added L. and M. and Roh. nor Roh.

(G 3) So the estate of a copyholder who holds at the will of the lord, according to the custom of the manor, is capable of enlargement, by release from the lord. The release converts the copyhold interest into a freehold tenure. 1 Watk. Copyh. 366, 367.—[Ed.]

(H 3) The original is *pur lease*, and it seems, that it should be translated, *by a lease instead of by the lease*. See n. (K 3), *infra*.—[Ed.]

(I 3) Littleton in this section must be understood merely as putting a particular case, with special circumstances, and for the sake of illustrating his doctrine by a distinction: viz. that a man who has merely the occupation of lands, without any estate, is not capable of a release. But it may be remarked, that the rightful owner might have treated the person thus claiming to occupy at will as a trespasser, or as a disseisor at election; for every person who enters wrongfully, is necessarily a trespasser, and the freeholder may at his election treat the trespasser as a disseisor, *Blunden v. Baugh*, Cro. Car. 302; and as the trespasser cannot qualify his own wrong (*infra*, 271 a.), every disseisin (except, perhaps, the particular and special case of a disseisin of the tenant of a particular estate, under a claim of his estate only, *infra*, n. (L 3) is necessarily a disseisin of the fee-simple, and the disseisor, we have seen, is capable of a release from the disseisee in extinguishment of the right. See 2 Prest. Conv. 311, 312. Ante, 274 a. p. 465. *Infra*, n. (K 3).—[Ed.]

(K 3) Mr. Preston, in his valuable Treatise on Conveyancing, remarks, that this passage of Lord Coke's Commentary, which applies the text of Littleton in the above section, to a tenant at sufferance, seems to be mistaken; probably owing to the translation of the text, inserting the *lease* for a *lease*. See 2 Conv. 304. The same writer observes, that the case put by Littleton in the above section, is the general authority that a *mere trespasser*, or a mere occupier, though he may claim to hold at will, has no estate; and that without an estate creating the relative situation of tenant, or *quasi* tenant, and lord or reversioner, there cannot be an effectual release by way of enlargement. At the same time that this section is urged, and its principle acknowledged, it is rather a subject of surprise that the law had not accepted the conduct of the parties, as evidence that the occupier consented to be *tenant at will*, and that the owner of the inheritance agreed to this tenancy, considering the release as the evidence and acknowledgment of the tenancy, and as the only means by which the release could be effectual by way of conveyance; and in modern practice no reasonable doubt can be entertained, that under such circumstances the law would consider the occupier, or the occupiers, by sufferance, as tenant at will. 2 Prest. Conv. 303, 304.

(b) For if a man entereth into land of his own wrong, and take the profits, his words to hold it at the will of the owner cannot qualify his wrong, but he is a disseisor (L 3), and then the release to him is good; or if the owner consented thereunto, then he is a tenant at will, and that way also the release is good. But there is a diversity when one cometh to a particular estate in land by the act of the party, and when by act in law; for if the guardian hold over, he is an abator, because his interest came by act in law (1).

(b) Tempe H.
8 tit. tenant
a volunt. Br.
15. 2 E. 4. 38.
18 E. 4. 25.
39 E. 3. 28.
12 E. 3. Ass.
66. 11 E. 3.
Ibid. 67. 12
Ass. 21. 13
E. 3. Ass. 92.
23 Ass. 11.
34 Ass. 10.
10 E. 3. 41.
8 E. 3. 63.
10 E. 4. 9, 10.

(1 Rol. Abr. 662. Ante, 277.) Vide 2 part of the Institutes. Marlb. cap. 16.
(1 Rol. Abr. 861. Ante, 56 a.)

*By these two sections is to be observed a diversity between a tenant at will, and a tenant at sufferance; for a release to a tenant at will is good, because between them there is a possession with a privity; but a release to a tenant at sufferance is void, because he hath a possession without privity. As if lessee for years hold over his term, &c. a release to him is void, for that there is no privity between them; and so are the books that speak of this matter to be understood (2).

(506)*
270 b.
or as to a ten-
nant at suf-
ferance.
21 H. 6. 37.
2 E. 4. 6 b.
7 E. 4. 27.
3 E. 4. 16.
29 H. 6. Re-
lease. 6. (5
Rep. 13. 2
Sid. 153. Ant.
47. Cro. Jac.
169.)

And see the case of *Rees d. Chamberlain v. Lloyd*, Wightwick, 123. 2 Prest. Conv. 305—309; in which it was held, that *mere permission to occupy was a lease.*—[Ed.]

(L 3) Though it is generally true, that he who enters wrongfully and takes the profits is a disseisor of the fee-simple, yet this is to be understood where there is no particular estate in the land; for a person who enters, *claiming a term*, where there is such a term, or who enters claiming any particular estate, where there is such particular estate, may become tenant for that particular estate, by the dispossession of the termor or disseisin of the owner of the particular estate; without divesting the estate of the person, who has the reversion or remainder, or committing any wrong beyond the particular estate. 2 Prest. Conv. 321. 3 Lev. 35. 3 Mod. 96. Hawk. Abr. 35. But when there is not any particular estate, or when the entry is general, without a claim confined, in terms or by the circumstances, to the *particular estate*, there will be a disseisin of the fee-simple, 2 Prest. Conv. 323: and when there are interposed estates, it is agreed, that a disseisin of the tenant for life, unless it be special and confined to the life estate, will be a disseisin to those in remainder or reversion, so long at least, and perhaps so long only, as the interests under these particular estates shall continue. Ib. 317.—[Ed.]

(1) “P. 9. *Car. C. B. on the argument of the case of Blundell or Baugh, commonly called the Earl of Nottingham’s case, Justice Barclay said, that he whom Lord Coke calls in this place an abator, must be taken for a disseisor, as he had actual possession by the possession of the guardian.*”—Lord Nott. MSS.—[See Cro. Car. 302. Litt. Rep. 372. 1 Vent. 55. 80. [Butler, Note 230.]

(2) A tenant at will is he who enters and enjoys the land by the express or implied consent of the owner, without there being any obligation on the part of the lessor or lessee to continue it for any certain or determinate term. A tenant by sufferance is he who, having entered and obtained possession by title, continues the possession, after this title is ended, by the laches of the lessor. The former is in by the consent of the owner of the lands; this creates a privity between them. A tenant by sufferance is in only by the laches of the owner; so that there is no privity between them. Both these estates differ from that of a tenant from year to year; but after a new year is begun, the tenure cannot be determined either by the lessor or lessee till the end of the year. See 1 Ld. Raymond, 707, 708. 2 Salk. 413. 3 Salk. 222. If a person holds by lease, and the term expires, the lease itself is notice of the expiration of the term, and the lessor may enter on the lessee without further notice, unless for double rent, under the 4 Geo. 2. c. 28. sect. 1. in which case there must be a previous demand in writing. Where the tenant holds by will, the modern determinations are, that there must be a previous notice; but this notice varies according to the custom of the place, and the nature of the hereditaments in lease.

The editor has been favoured with the following note of an important determination on this point. York. Lammass Assizes, 1773. Richard Roe ex d. Chr. Brown against Ann

271 a.
Old N. B. 117.
137. Lib. 3.
fo. 23. Walk-
er's case.
Lib. 4. fo. 123,
124. Vide
sect. 454.

"*No privity.*" Privity is a word common as well to the English as to the French, and in the understanding of the common law is fourfold.

1. As privies in estate, whereof Littleton here speaketh; as between the donor and donee, lessor and lessee, which privity is ever immediate.
- (8 Rep. 42 b.) 2. Privies in blood; as the heir to the ancestor, or between coparceners, &c.
- (Ant. 242 a.) 3. Privies in representation; as, executors, &c. to the testator.

And fourthly, privies in tenure, as the lord and tenant, &c. which may be reduced to two general heads, privies in deed, and privies in law (N 3).

LITTLETON.
[Sect. 462.
271 a.]
But a cestui
que trust,

ALSO, if a man enfeoffe other men of his land upon confidence, and to the intent to perform his last will, and the feoffor occupieth the same land at the will of his feoffees, and after the feoffees release by their deed to their feoffor all their right, &c.

Wilkinson. Ejectment for two messuages and other premises at North Cowton. Thomas Beaver proved that he, by the lessor of the plaintiff's order, delivered a notice in writing to the defendant on the 10th of February, which notice he received from lessor of the plaintiff. The notice was as follows: "10th February, 1773. Ann Wilkinson, Take notice, that you are to quit and yield up the possession of the dwelling house, stable, shop, and coal house, with their appurtenances situate at North Cowton, which you rent under me, on the 13th day of May next. Yours, Chr. Brown." Thomas Masterman deposed, that for 30 years he had been bailiff at North Allerton, the market town for Cowton; that it was the usage to give half a year's notice in case of lands, but had known a great many given to quit houses at North Allerton at Candlemas for May day, and submitted to. Verdict for plaintiff, subject to Judge Gould's decision. The question was, this being the case of a house and building only, under 10*l. per annum*, viz. only 5*l. 5s. per annum*, and the year expiring at May day, old style, whether in an holding from year to year, the above notice was sufficient, or whether it ought not to have been half a year before the expiration of the year; 22d January, 1774. Before Judge Gould at his chambers, Mr. Davenport for the plaintiff argued, that a week's notice to a tenant at will was sufficient; that the defendant was tenant at will; that the custom in London required only three months' notice for tenements under 10*l.* a year; that the same custom was in general observed every where; and it was reasonable, and agreeable to late determinations; that the custom of the country was in this case proved in favour of the plaintiff, and cited the following cases: 13 Hen. 8. fol. 16.—59. Year Book. Brook, title Leases, pl. 53. Keilway, 163. Co. Lit. 68. See title, Tenant at will, 55. a. 69. Allyn, 4. Sir Thomas Bowes's case. 2 Lord Raym. 1008. *Title v. Grevett*. 2 Jones, 5. *Timberley v. Grobbam*—How. 2 Salk. 413, 414. 3 Burr. 1603. *Timmins v. Rawlinson*. 11 Vin. 406. tit. Estate. Mr. Lee for defendant argued, there was not, according to modern determinations, any such estate as an estate at will; every tenant being a tenant for a year or more; that the rent was immaterial and custom local; and expatiated on the hardships of poor tenants, if turned out on short notice, and cited Brook, tit. Leases, fol. 61. Yelverton, 73, 74. In April following, Mr. Justice Gould delivered his opinion to Mr. Davenport thus;—"I have consulted all the other judges, and we are all of opinion, that six months' notice to quit is necessary in all cases, whether of houses or lands, under or above 5*l. per annum*, unless where there is a particular custom to the contrary; and the custom at North Allerton was too far distant from North Cowton to affect the inhabitants there, unless proved to extend to that place also." Judgment for defendant. [Butler, Note 228.]

(N 3) On the subject of privity, see 2 Prest. Conv. 327—345.—[Ed.]

this hath been a question, if such release be good or no. And some have said, that such release is void, because there was no privity between the feoffees and their feoffor, inasmuch as no lease was made after such feoffment by the feoffees to the feoffor, to hold at their will; and some have said the contrary, and that for two causes.*

ONE is, that when such feoffment is made upon confidence to perform the will of the feoffor, it shall be intended by the law for intendments of law mentioned by our author, see the sections in the margin), that the feoffor ought presently to occupy the land at the will of his feoffees; and so there is the like kind of privity between them, as if a man make a feoffment to others, and they immediately upon the feoffment (quæ incontinenti fūm in esse vident') will and grant, that their feoffor shall occupy the land at their will, &c.

"At their will, &c." Here is implied, every tenancy at will is at the will of both parties, as before in his proper place hath been showed.

ANOTHER cause they allege, that if such land be worth forty shillings a year, &c. then such feoffor shall be sworn in assise, and other inquests in pleas real, and also in pleas personal, of what great sum soever the plaintiff will declare, (73) &c. And this is by the common law of the land. Ergo, this is for a great cause. And the cause is, for that the law will that such feoffors and their heirs ought to occupy, &c. and take and enjoy all manner of profits, issues, and revenues, &c. as if the lands were their own, without interruption of the feoffees, notwithstanding such feoffment. Ergo, the same law giveth a privity between such feoffors and the feoffees upon confidence, &c. for which causes they have said, that such releases made by such feoffees upon confidence to their feoffor or to his heirs, &c. so occupying the lands (74), shall be good enough: and this is the better opinion, as it seemeth.

(75) Quære, for this seemeth no law at this day.

Here is a question moved, and the reasons of both sides *showed, and, as it hath been observed, the latter opinion is the better, being Littleton's own opinion (o 3).

(73) &c. not in L. and M. nor Roh.

(74) &c. added in L. and M. and Roh.

(75) This paragraph not in L. and M. nor

Roh.

(o 3) See acc. 2 Prest. Conv. 289—291. where it is said, that the case of the trustee and *cestui que trust*, and the case of a *mortgagor* and *mortgagee* may, with great propriety, be referred to the same principles. The law on this point will frequently obviate the objection that there is not any evidence of a lease for years, as part of a reconveyance by a mortgagee to the mortgagor; or by a trustee to his *cestui que trust*, when the mortgagor or *cestui que trust* has the possession of the land. And a recital of the fact of possession will

272 b. “*And this is by the common law.*” Here three things are to be observed. First, that the surest construction of a statute, is by the rule and reason of the common law. Secondly, that uses were at the common law. Thirdly, that now seeing the statute of (c) 27 H. 8. cap. 10., which hath been enacted since Littleton wrote, hath transferred the possession to the use, this case holdeth not at this day ; but this latter opinion before that statute was good law, as Littleton here taketh it.

(8 Rep. 42 b.) “*The same law giveth privity, &c.*” Hereof it followeth, that when the law gives to any man, any estate or possession, the law giveth also a privity and other necessities to the same; and Littleton concludeth it with an illative, *ergo, the same law giveth a privity*, which is very observable for a conclusion in other cases.

(Ante, 156 b.)
(509)*

And the (*quære*) here made in the end of this section is not in the original, but added by some other, and therefore to be rejected.

273 b.
How a release by enlargement shall enure. On release of all the right to tenant *pur autre vie*, an estate for his own life passes. (Ante, 42 a.)

It is further to be observed, that to a release that enureth by way of enlargement of the estate, there is not only required privity, as hath been said, and an estate also, but sufficient words in law to raise or create a new estate. If a man make a lease to A. for term of the life of B., and after release to A. all his right in the land, by this A. hath an estate for term of his own life ; for a lease for term of his own life is higher in judgment of law, than an estate for term of another man's life.

LITTLETON.
[Sect. 465.
272 b.]

ALSO, releases according to the matter in fact, sometimes have their effect by force to enlarge the state of him to whom the

suffice, and by parity of reasoning the proof of the fact would be equivalent to a recital. Ib. 292, 293.

The doctrine with respect to the persons to whom a release enuring by way of enlargement may be made, is thus summed up by the learned writer to whom we have just referred. “Every particular vested estate is capable of enlargement. Therefore the estate of tenant for years, (supra, sect. 459. p. 501), for life, and either for his own life or *pur autre vie*, (infra, 273 b. p. 509), or in tail (2 Rol. Abr. 400. Shep. T. 323.), and either in his own right, or in the right of his wife (supra, 273 b. p. 501), or even, it is apprehended of a testator; and even the estate of a tenant at will (supra, sect. 460. p. 594), or of a copyholder (Watk. Copy. 36 a.), or, according to the better opinion, of a *cestui que trust*, holding at the will of the trustees (supra, sect. 462, 463. p. 506, 507), or of a mortgagor holding at the will of the mortgagee, of tenant by statute merchant, *elegit*, or the like (supra. 270 b. p. 503. Shep. Touch. 322), may be enlarged by release. But tenant *at sufferance* has no estate, nor is there any privity remaining; and as a consequence he is not capable of a release to operate in enlargement of an estate. Supra, 207 b. p. 506. *Butler v. Duckmanton*, Cro. Jac. 169. In short, a person who merely has the possession, or holds by sufferance, is inaccurately denominated a tenant. Tenants in dower and by curtesy, being those husbands and wives who have actual estates, are capable of such release. They have a notoriety of possession, and privity of estate with the releasor. Each of these tenants has an estate of freehold. It is at the same time observable, that before the title of dower is perfected by execution or endowment, the dowress has not any estate, (Gilb. Ten. 26. *Roe v. Power*, N. R. 1. Supra, 273 a. p. 501.) she has merely a title of dower. That title may, by way of extinguishment, be released by the dowress; but while she has any interest short of an estate, she is not, in respect of such interest, capable of a release; nor can she convey by lease and release, till she becomes tenant, in other words, till she has an estate in dower.” 2 Prest. Conv. 284, 285.—[Ed.]

*release is made (r 3). As if I let certain land to one for term of years, by force whereof he is in possession, and after I release to him all the right (all the right, vide sect. 650.) which I have in the land, without putting more words in the deed, and deliver to him the deed, then hath he an estate but for term of his life. And the reason is, for that when the reversion or remainder is in a man, who will by his release enlarge the estate of the tenant, &c. he shall have no greater estate, but in (76) such manner and form as if (77) such lessor were seised in fee, and by his deed will make an estate to one in a certain form, and deliver to him seisin by force of the same deed: if in such deed of feoffment there be not any word of inheritance (78), then he hath but an estate for life; and so it is in such releases made by those (79) in the reversion or in the remainder. For if I let land to a man for term of his life, and after I release to him all my right, without more saying in the release, his estate is not enlarged. But if I *release to him and to his heirs, then he hath a fee-simple; and if I release to him and to his heirs of his body begotten, then he hath a fee-tail, &c. And so it behoveth to specify in the deed, what estate he to whom the release is made shall have.*

So on a release of all the right to lessee for years, an estate for life passes.

[Coke,

273 b.]

(510)*

But to a release enlarging an estate into a fee, words of inheritance are necessary.

“For term of years.” So it is if a release be made to tenant by statute staple, or merchant, or tenant by *elegit*, as hath been said; and so likewise to guardian in chivalry which holdeth in for the value, by him in the reversion of all his right in the land, by this a freehold passeth for the life of him to whom the release is made, for that is the greatest estate that can pass without apt words of inheritance.

273 b.

(Ante, 270 b.)

If a man make a lease for ten years, the remainder for twenty years, he in the remainder releaseth all his right to the lessee, he shall have an estate for thirty years; for one chattel cannot drown another, and years cannot be consumed in years (q 3).

(1 Leon. 303.
323. Ant.
193 b.)

(76) *tiel—la*, L. and M. and Roh.

(78) *Et*, added in L. and M. and Roh.

(77) *si*, added in L. and M. and Roh.

(79) *per eum*, not in L. and M. nor Roh.

(r 3) See ante, n. (z 2), p. 499, and n. (d 3), and n. (z 3), p. 502.—[Ed.]

(q 3) But this doctrine seems questionable. It is clear that a term of years, derived by way of under-lease, out of a term of years, may merge on their union. Owen, 97 Cro. Eliz. 173. 1 Leon. 303. Poph. Rep. 30. And an estate for years may also merge in another estate in reversion, of the same denomination; and it seems, that the law does not allow of any difference when the reversion is for a longer or shorter space of time, than the former or preceding estate. Shep. Touch. 341, n. *Hughes v. Robotham*, Cro. Eliz. 309. 4 Bac. Abr. 211. ed. Gwil. And the better opinion appears to be, that one term will merge in another when the more remote term is a remainder. See 3 Prest. Conv. 201—203. It seems clear also, that when two vested terms, one of ten years and another of the reversion for twenty years, vest in A., the estate of the owner of these terms will determine at the end of twenty years at farthest. The more immediate term cannot continue beyond the ten years, and the more remote term must end with the expiration of the twenty years: and the original ten years will expire at the same time that the lease for twenty years is completing the measure of its duration; therefore, even admitting that the terms in the case above propounded remain distinct, Lord Coke's conclusion cannot be maintained. But, if it be applied to an actual term for twenty years, and an additional or superadded *interesse ter-*

- (511) * “*But if I release to him and to his heirs, &c.*” Here it is to be observed, that when a release doth enure by way of enlargement of an estate, no inheritance, either in fee-simple or fee-tail, can pass without apt words of inheritance.

LITTLETON.
[Sect. 467.
272 a.]

Diversity
herein be-
tween a re-
lease de mit-
ter le droit,
and a release
d'enlargir
l'estate.

[COKE,
274 a.]
(Ante, 280 a.)

BUT here note, that when a man is seised in fee-simple of any lands or tenements, and another will release to him all the right which he hath in the same tenements, he needeth not to speak of the heirs of him to whom the release is made, for that he hath a fee-simple at the time of the release made. (And the reason of Littleton hereof is, for that the disseissor hath a fee-simple at the time of the release made. And this appeareth by that which hath been said before, so as regularly he that hath a fee-simple at the time of the release made of a right, &c. needeth not speak of his heirs.) *For if the release was made to him (80) for a day or an hour, this shall be as strong to him in law, as if he had released to him and his heirs. For when his right was once gone from him by his release without any condition, &c. to him that hath the fee-simple, it is gone for ever.*

LITTLETON.
[Sect. 468.
274 b.]
(2 Rol. Abr.
400.)

BUT where (81) a man hath a reversion in fee-simple, or a remainder in fee-simple, at the time of the release made, there if he will release to the tenant for years, or for life, or to the tenant in tail, he ought to determine the estate which he to whom the release is made shall have by force of the same release, for that such release shall enure to enlarge the estate of him to whom the release is made (82) (R 3).

(80) *et a ses heirs*, added in L. and M.
and Roh.

(81) *home—un*, L. and M. and Roh.

(82) *&c.* added in L. and M. and Roh.

mini of ten years, to commence after the effluxion of the twenty years, or a term of ten years, and such superadded *interesse termini* of twenty years, then the termor will have the right of enjoyment for the additional years. Ib. 217, 218. For it is the nature of that species of interest called an *interesse termini*, that it does not pass the immediate reversion, although it is granted by the owner of the reversion. It operates by way of contract only, for a term to commence at a future period; and as there is not any present and immediate estate, there cannot be any merger. Hence it is a rule that an *interesse termini* will neither cause, nor prevent a merger. Ib. 207—212.

In regard to *under-leases* and their merger, it is observable, that partly as lord or reversioner, and partly as beneficial owner, the whole term, subject only to the under-lease, continues in the reversioner. The surrender of the under-lease merely accelerates the right of possession in the first lessee, by substituting the possession in the place of the seignory or reversion. The merger, too, of a larger term in one of shorter duration, may be accounted for, on the ground, that it is merely a relinquishment of the *tenancy*, or rather *possession*, to the person who has the immediate reversion, or perhaps, remainder. Ib. 218, 219.—[Ed.]

(R 3) Releases, like other conveyances, regularly require words of inheritance; so that unless the release be expressly made to the releasee and his heirs, it will give him an estate for life only. But in releases by extinguishment, as where the lord releases all his right to the tenant, the seignory is extinct without the word “heirs;” for this instrument is to discharge the estate of the tenant, and therefore has a necessary relation to the estate which the lord at first created, and consequently it refers to those words that in the original of the estate gave him a fee-simple. Ante, 9 a. vol. 1. p. 499. So in releases by way of *mitter l'estate*, words of inheritance are not requisite; as where there are two coparceners or joint-tenants, and one of them releases to the other, this gives a fee without the word “heirs,” because it refers to the whole fee of which they are jointly seised by virtue of the former

*Of this sufficient hath been said before.

(512)*
274 b.

*BUT otherwise it is where a man hath but a right to the land, and hath nothing in the reversion nor in the remainder in deed. For if such a man release all his right to one which is tenant in the freehold, all his right is gone, albeit no mention be made of the heirs of him to whom the release is made. For if I let lands (83) to one for term of his life, if I after release *to him to enlarge his estate, it behoveth that I release to him and to his heirs of his body engendered, (84) or to him and his heirs, or by these words. To have and to hold to him and his heirs (85) of his body engendered, (86) or to the heirs male of his body engendered, or such like estates, or otherwise he hath no greater estate than he had before.*

LITTLETON.
[Sect. 469.
274 b.]

*275 a.

BUT if my tenant for life letteth the same land over to another for term of the life of his lessee, the remainder to another in fee, now if I release to him to whom my tenant made a lease for term of life (87), I shall be barred for ever, albeit that no mention be made of his heirs, for that at the time of the release made I had no reversion, but only a right to have the reversion. For by such a release, and the remainder over, which my tenant made in this case, my reversion was discontinued, (88) &c. (here discontinuance is in a large sense taken for divested, though the entry of the lessor be not taken away, which is implied in this &c.) and this release shall enure to him in the remainder, to have advantage of it, as well as to the tenant for term of life (1).

LITTLETON.
[Sect. 470.
275 a.]

(Post, 327.)
[COKE,
275 b.]
(Post, 327 b.)

FOR to this intent, the tenant for term of life, and he in the remainder, are as one tenant in law, and are as if one tenant were sole seised in his demesne as of fee at the time of such release made unto him, &c.

LITTLETON.
[Sect. 471.
275 b.]

**"Are as one tenant in law."* Which is certainly true in this case of remainder; and so it is also in case of a reversion; as if a disseisor make a lease for life, and the disseisee doth release all his right to the lessee, this release shall enure to him in the reversion,

(513)*
275 b.

(83) *ou tenements*, added L. and M. and Roh.

(86) *ou a les heires males de son corps engendres*, not in L. and M. nor Roh.

(84) *ou*, not in L. and M. nor Roh.

(87) *ceo—jeo*, L. and M. nor Roh.

(85) *males*, added L. and M. and Roh.

(88) *&c.* not in L. and M. nor Roh.

feudal contract, and the release only operates as a discharge from the right of another seised under the same contract. *Infra*, 273 b. So in releases by way of *mitter de droit*, the word "heirs" is not necessary, because the disseisor is already seised of the inheritance by force of the disseisin. *Ante*, 276 a. n. (n 1).—[*Ed.*]

(1) Here Littleton shows the operation of a release *de mitter le droit*, when made to the feoffee of the disseisor. The feoffee is in by title; his estate cannot be divested or disaffirmed, but by an act equal to that which created it. A release does not affect his possession or title, but discharges it from the right of the releasor; so that whether the whole fee is in the feoffee, or carved out into particular estates, it remains unaltered by the release, except as it is discharged by it from the right of the releasor.—[*Butler*, Note 239.]

albeit they have several estates, as hath been said, which is implied in this &c.

But if a disseisor make a lease for life, the remainder in fee, albeit they to some purposes (as here is said) are as one tenant in law, yet if the disseisee release all actions to the tenant for life, after the death of the tenant for life, he in the remainder shall not take benefit of this release, for it extended only to the tenant for life, as it is holden (*d*) in *Edward Altham's* case. And in like manner, if the disseisor make a lease for life, and the disseisee release all actions to the lessee, this enureth not to him in the reversion; and so our author is to be understood of a release of rights, and not of a release of actions, to the tenant for life, as to or for the benefit of him in the remainder or reversion.

(d) Lib. 8. fol. 148. Edw. Altham's case. (Post, sect. 494.)

275 a.
(Ante, 279.)

Littleton having before spoken of releases which enure by way of enlargement, by way of *mitter l'estate*, and by way of *mitter le droit*, here speaketh of a release of a right which in some respects enureth by way of extinguishment; as in this case which Littleton here putteth, the release to the lessee of the lessee doth not enure by way of *mitter le droit*, for then should he have the whole right, but as it were by way of extinguishment, in respect of him that made the release, and that it shall enure to him in the remainder, which is a quality of an inheritance *extinguished. But yet the right is not extinct in deed, as hath been said before in this Chapter.

*275 b.

273 b.
4. Release do
notoriety in l'es-
tate.
(514)*
9 Eliz. Dyer,
263. 10 Eliz.
Bendish's
case. Lit.
lib. 3. fol. 68.
69, 70 b. 130 b.
To whom to

There is a diversity between a release that enureth by way of enlargement of the state and by way of *mitter l'estate* (τ 3); *for when an estate passeth by way of *mitter l'estate*, there sometime there need not any words of inheritance. As if a joint estate be made to the husband and to his wife, and to a third person, and to their heirs, the third person releaseth all his right to the husband, this shall enure by way of *mitter l'estate*, and not by way of en-

(τ 3) When two or more persons become seised of the same estate by a joint title, either by contract or descent, as joint-tenants or coparceners, and one of them releases his right to the other, such release is said to enure by way of *mitter l'estate*. For where two several persons come in by the same feudal contract, one of them may discharge to the other the benefit of such contract by a release; because no notoriety is needful, for there was a sufficient notoriety in the prior feudal contract. Thus, two coparceners come into one entire feud, descending from their ancestor, and therefore they may release privately to each other, because they take by the former descent, which established them in possession, without any notoriety. But since coparceners do also transmit distinct estates to their children, they may also pass their estates by distinct feoffments. But joint-tenants can only pass their estates to one another by release, for they all come in by the first feudal contract; and therefore a second feoffment cannot give any further title or notoriety, because every person is supposed to be in by his elder title, which, in the case of joint-tenants, is the original feoffment, so that a second feoffment would be useless. In releases that enure by way of *mitter l'estate*, words of inheritance are not necessary, for the parties are not in by the release, but by the original feudal contract, which passed an inheritance, and the release only discharged the right or pretension of one of them. Gilb. Ten. 72—74.

One tenant in common, we have seen, cannot release to his companion, because they have distinct freeholds, but they must pass their estates by feoffment and livery of seisin; for, as they were created by different acts, and different liveries, they must also pass to each other by distinct liveries. Ante, 200 b. vol. 1. p. 788. Gilb. Ten. 74.—[Ed.]

largement of the estate, because the husband had a fee-simple, and needeth not to have any words of inheritance. So it is, if the release had been made to the wife.

be made, and how it shall enure.

Husband and wife and a third person, de mitter l'estate.

having a joint estate, a release by the third person to the husband enures de mitter l'estate. See before in the Chapter of Fee-simple, 9.
So if made to the wife.

(e) If there be three joint-tenants, and one release to one of the other all his right, this enureth by way of *mitter l'estate*, and passeth the whole fee-simple without the word (heirs). But if there be two joint-tenants, and the one of them release all his right to the other, this doth not to all purposes enure by way of *mitter l'estate*, for it maketh no degree, and he to whom the release is made shall for many purposes be adjudged in from the first feoffor, and this release shall vest all in the other joint-tenant without the word (heirs).

On release by one of three joint-tenants to one of his companions, it enures de mitter l'estate;

(e) 40 E. 3. 41. 46 E. 3. 19 H. 6. 33 H. 6. 5. 10 E. 4. 3. but a release by one of two joint-tenants to the other, does not to all purposes enure de mitter l'estate.

But if there be two coparceners, and the one release all his right to the other, this shall enure by way of *mitter l'estate*, and shall make a degree, and without the word (heirs) shall pass the whole fee-simple. And it is to be observed, that to releases that enure by way of *mitter l'estate*, there must be privity of estate at the time of the release.

On release by one of two coparceners to the other, it enures de mitter l'estate.

10 E. 4. 3. b. 37 H. 6. tit.

Alienation. Br. 31. 31 H. 4. 8. 40 Ass. 5. 9 Eliz. Dyer, 263. Words of inheritance not necessary to a release de mitter l'estate. But privity of estate is requisite.

(2 Rol. Abr. 403. 10 E. 4. 3 b.)

If two coparceners be of a rent, and the one of them *take the ter-tenant to husband, the other may release to her, notwithstanding the rent be in suspense, and it shall enure by way of *mitter l'estate*, and she may release also to the ter-tenant, and that shall enure by way of extinguishment: but if she release to her sister and to her husband, it is good to be seen how it shall enure.

(515)*

Littleton has now spoken of releases that enure by way of enlargement of the estate, of releases that enure by way of *mitter l'estate*, and of releases that enure by way of *mitter le droit*. So as of that which hath been said by our author of releases, it appeareth that some do enure by way of enlargement of estate, some by way of *mitter l'estate*, some by way of *mitter le droit*, by way of entry and feoffment, and some by extinguishment.

Vid. Litt. fol. 68, 69. (8 H. 4. 8.) Ante, 280 a.)

(516)*

CHAP. XLI.*

SAME SUBJECT.

OF A CONFIRMATION.

295 b.
Definition of
a confirma-
tion.
(*) Lit. pag.
sequen.
Bract. lib. 2.
53.

CONFIRMATION, *confirmatio*, cometh of the verb (*) *confirmare*, *quod est firmum facere*; and therefore it is said, that *confirmatio omnes supplet defectus, licet id quod actum est ab initio, non valuit*. A confirmation is a conveyance of an estate or right in *esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased (A).

Its nature
and opera-
tion.
Bract. lib. 2.
fol. 27. 53.
36 H. 6. 34. 37.
Pl. Com.
Count de Lei-
cester's case.
3 Rep. 646.
10 E. 2. Con-
firm. 24. 32
E. 3. 9.
(a) Fleta, lib.
3. cap. 14. &
lib. 3. cap. 3.
(517)*

A confirmation doth not strengthen a void estate (B). *Confirmatio est nulla ubi donum præcedens est invalidum, et ubi donatio nulla omnino nec valebit confirmatio*; for a confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void in law. *Non valet confirmatio nisi ille qui confirmat sit in possessione rei, vel juris unde fieri debet confirmatio, et eodem modo nisi ille cui confirmatio sit, sit in possessione*. And another saith, (a) *Confirmare est id quod prius infirmum fuit firmare. Et donationum alia incepta, et defectiva, et post tempus confirmata, *confirmatio enim omnem supplet defectum, poterit enim esse in pendentem donec per ratihibitionem hæredis cum ad ætatem pervenerit roboretur*.

The different
kinds.

Lib. 9. fol.
142. Bes-
mond's case.
Fleta, lib. 3.
cap. 14.

Here it is to be observed, that there be two kinds of confirmations, viz. confirmations express or in deed, whereof Littleton (sect. 515.) hath put three examples, and confirmations implied, or in law, whereof Littleton hereafter speaketh in this Chapter. *Quælibet confirmatio, aut est perficiens, crescens, aut diminuens*; and of all these Littleton putteth examples in this Chapter. And hereof Fleta saith, *carta autem de confirmatione est illa quæ alterius*

(A) A *confirmation* is an approbation of, or assent to, an estate already created; by which the confirmor, as far as it is in his power, strengthens and makes it valid. It has this operation only, with respect to estates voidable or defeasible; but it has no operation on estates which are absolutely void. Such words may be used in a confirmation as may increase or enlarge the estate; but that, as Lord Chief Baron Gilbert observes, is by force of such words, and is foreign to the business of confirmation. Gilb. Ten. 75. [*Butler*, Note 253.] And wherever an estate is to be enlarged by a confirmation, privity is requisite, as well as in the case of a release. *Infra*, 296 a. The effect of a confirmation is to give validity to a voidable or defeasible estate; but it cannot operate upon an estate which is absolutely void. *Supra*, 295 b. The proper technical words of a confirmation are, ratify, approve, and confirm, *infra*, sect. 520; but the words "give and grant, or demise," have the same effect in some cases as the word "confirm." *Infra*, sect. 531.—[*Ed.*]

(B) Though it be a rule that things *ipso facto* void cannot be made good by acceptance, yet it is not without exception; as if tenant in tail makes a lease to commence in *future*, and dies before the day, and the lessee enters, the issue in tail may have an action of trespass against him, or he may by acceptance make it good. *Per Holt, C. J. Pullen v. Purbeck*, 12 Mod. 361.—[*Ed.*]

factum consolidat & confirmat & nihil novi attribuit, quandoque tamen confirmat & addit (1).

A DEED of confirmation is commonly in this form, or to this effect: Know all men, &c. that I, A. of B. have ratified, approved, and confirmed to C. of D. the estate and possession which I have, of and in one messuage, &c. with the appurtenances in F. &c.

LITTLETON.
[Sect. 515.
295 b.]
1. Confirmation in deed, by what words made.

Here first our author shows what a confirmation is :

"*Ratificasse.*" *Ratificare est ratum facere* and is, *æquipolent* to *confirmare*, which, as hath been said, is *firmum facere*.

295 b.
Bract. lib. 2.
fol. 32 b. & 58.
59. Brit. 235.
44 Ass. 3.

"*Approbasse*" cometh of *ad* and *probo*, which is to make perfect and good.

ALSO, in some case, this verb *dedi*, (1) or this verb *concessi*, hath the same effect in substance, and shall enure to the same intent, as this verb *confirmavi*. As if I be disseised of a carve of land, and (2) I make such a deed ; sciant præsentēs, &c. quod *dedi* to the disseisor (3), &c. or quod *concessi* to the said disseisor, the said carve, &c. and I deliver only the deed to him without any livery of seisin of the land, this is a good *confirmation, and as strong in law, as if there had been in the deed this verb *confirmavi*, &c.

LITTLETON.
[Sect. 531.
301 b.]
2. Confirmation in law, by what words created.
Operation of the word "grant."
(518)*

Here Littleton proceedeth, according to the former division, to show words that in law do amount to a confirmation. And here is to be observed, that some words are large, and have a general extent, and some have a proper and particular application. The former sort may contain the latter ; as *dedi* or *concessi*, may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c. and it is in the election of the party to use to which of these purposes he will.

301 b.
Bract. lib. 2.
fol. 59 b. 21
H. 6. feoffment & feits
103. 22 H. 6.
42. 14 H. 4.
36. 19 H. 6.
44. 7 H. 7. 16.
22 E. 3.
Briefe, 291.
Brooke tit.
Confirm. 20.
14 H. 7. 2. 37
H. 6. 17. Dy.
6 Eliz. 4 H. 7.
10. 22 E. 4. 36.
40 E. 3. 31.
(Sid. 452.
Flo. 193.
Rep. 17 a. 1
Rol. Abr. 439.
Noy, 63.)
14 H. 4. 36.
Lib. 5. fol. 15.
In Newcoman's case.

And he to whom such a deed comprehending *dedi*, &c. is made, may plead it as a grant, as a release, or as a confirmation, at his election (D).

If a parson and ordinary make a lease for years of the glebe to the patron, and the *patron by his deed granteth it over, or if the disseisor granteth a rent to the disseisee, and he by his deed grant-

*302 a.

(1) *ou—et*, L. and M. and Roh.

(2) *puis*, added L. and M. and Roh.

(3) *&c. VEL QUOD CONCESSI a le disseisor*,
&c. not in L. and M. nor Roh.

(1) See 9 Rep. 142. where Sir Edward Coke brings examples of these different operations of a confirmation. [Butler.]

(D) But a lease and release, either at the common law, or through the medium of a bargain and sale, cannot be pleaded as a feoffment, Bro. Feoffment, pl. 44. Vin. Abr. B. 2. pl. 1. 2 Prest. Conv. 238 : nor as a grant of the reversion. Noy. 66.—[Ed.]

(Ant. 280.
Post. 293.
5 Rep. 15, 16.)

eth it over, and after re-*enter* ; in both these cases one and the same words do amount both to a grant, and to a confirmation in judgment of law of one and the same thing ; *ne res pereat*. And so it is if a disseisor make a lease for life, or a gift in tail, the remainder to the disseisee in fee, the disseisee by his deed granteth over the remainder, the particular tenant attorneth, the disseisee shall not enter upon the tenant for life, or in tail, for then he should avoid his own grant, which amounted to a grant of the estate, and a confirmation also.

302 a.
Bract. lib. 2.
fol. 59 b.

Est autem confirmatio quasi quædam ratihabitio, sufficit tamen quandoque per se, si etiam in se contineat donationem, ut si dicat quis, dedi et confirmavi, licet juvari possit ex aliquâ donatione præcedente.

(519)*
(4 Rep. 80 b.
2 Cro. 169.
Mo. 34. Flo.
397, 398.)

*But a release, confirmation, or surrender, &c. cannot amount to a grant, &c. nor a surrender to a confirmation, or to a release, &c. because these be proper and peculiar manner of conveyances, and are destined to a special end (E).

"demise."

(b) 32 E. 3.
Briefe, 291.
Brooke tit.
Confirm. 20.
Vid. le stat.
de Ginc. ca. 4.
(c) 7 E. 3. 9.
"will."

"*Dedi et concessi, &c.*" Here is implied that there be more words than *dedi* and *concessi*, that will amount to a confirmation, as *dimisi*. (b) In ancient statutes and in original writs, as in the writ of entry *in casu proviso, in consimili casu ad communem legem*, and many others, this word *dimisi* is not applied only to a lease for life, but to a gift in tail, and to a state in fee. (c) Also if a man make a lease to A. for years, and after by his deed the lessor *voluit quod haberet et teneret terram pro termino vitæ suæ* ; this is adjudged by this verb (*volo*) to be a good confirmation for term of his life. *Benignè enim faciendæ sunt interpretationes cartarum propter simplicitatem laicorum ut res magis valeat quàm pereat.*

Bracton.
(Flo. 169.)

LITTLETON.
[Sect. 534.
302 a.]

On joint-feoffment by disseisee and disseisor's heir, it operates as to the disseisee, as a confirmation.

*302 b.

*ALSO, if a man be disseised, and the disseisor die seized, and his heir is in by descent, *and after the disseisee and the heir (4) of the disseisor make jointly a deed to another in fee, and livery of seisin is made upon this, (as to the heir of the disseisor that sealed the deed) the tenements do pass (5), and enure by the same deed by way of feoffment ; and as to the disseisee, who sealed the deed, this shall enure, (6) but by way of confirmation. But if the disseisee in this case brings a writ of entry in the per and cui against the alienee (7) of the heir of the disseisor ; quære, how he shall plead this deed against the demandant by way of confirmation (8).*

(4) *le disseisor*, not in L. and M. nor Roh.

(5) *et uront*, not in L. and M. nor Roh.

(6) *sinon—mes*, L. and M. and Roh.

(7) *del—le*, L. and M. and Roh.

(8) *Ec.* not in L. and M. nor Roh.

(E) That a release may operate as a substantive grant when it is made by the owner of a reversion or remainder, see 2 Prest. Conv. 332. 439. As to the effect of the word "grant," in implying a warranty, see ante, p. 252. 254. n. (1) and (K).—[Ed.]

"*Quere how he shall plead this deed, &c.*" He may plead the feoffment of the heir of the disseisor, and the confirmation of the disseisee, as it hath been pleaded and allowed. 303 a. Lib. 1. fol. 146, 147. May-owe's case.

"*As to the heir of the disseisor, &c. the tenements do pass by way of feoffment.*" For *the land shall ever pass from him that hath the state of the land in him. As if *cestuy que use* and his feoffees, after the statute of 1 R. 3. and before the statute of 27 H. 8. cap. 10. had joined in a feoffment, it shall be the feoffment of the feoffees, because the state of the land was in them. (520)* 302 a. *302 b. 21 H. 7. 34 b. Pl. Com. 59 a. in Wimbishe's case. (6 Rep. 15 a.)

So it is, if the tenant for life, and he in the remainder, or reversion in fee, join in a feoffment by deed; the livery of the freehold shall move from the lessee, and the inheritance from him in the reversion or remainder, from each of them according to his estate. For it cannot be adjudged by law, that the feoffment of tenant for life, doth draw the reversion or remainder out of the lessor or him in the remainder, or doth work a wrong because they joined together (r). Pl. Com. 59 a. Pl. Com. 140. in Brown-ing's case. 2 H. 5. 7. 13 H. 7. 14. 13 E. 4. 4 a. 27 H. 8. 13. M. 16 & 17 El. 339. (Sid. 83.) (1 Rol. Abr. 653.) (Ante, 45 a.) (1 Rep. 76, 77.)

If there be tenant for life, the remainder in tail, &c. and tenant for life and he in the remainder in tail levy a fine, this is no discontinuance or divesting of any estate in remainder, but each of them pass that which they have power and authority to pass. Lib. 1. fol. 76. Bredon's case. (Post, 251 b.)

A. tenant for life, the remainder to B. for life, the remainder in tail, the remainder to the right heirs of B.; A. and B. join in a feoffment by deed, albeit it may be said that this is the feoffment of A. and the confirmation of B. and consequently he in the remainder in tail cannot enter for the forfeiture during the life of B., but because B. joined in the feoffment, which was tortious to him in the remainder in tail, and is *particeps criminis*, therefore they forfeited both their estates, and he in the remainder in tail might enter for the forfeiture. But if he in the reversion in fee and tenant for *life join in a feoffment by parol, this shall be (as some hold) first, a surrender of the estate of tenant for life, and then the feoffment of him in the reversion, for otherwise, if the whole should pass from the lessee, then he in the reversion might enter for the forfeiture, and every man's act (*ut res magis valeat*) shall be construed most strongly against himself (a). 17 Eliz. Dyer, 339. (1 Leo. 31.) (1 Leo. 37. 282.) (521)*

(r) Tenant for life, and he in the remainder in fee, make a lease for years by deed indentured; the lessee being ejected, declared upon the demise made by the tenant for life, and the remainder-man; and adjudged against the plaintiff, for living the tenant for life, it is only the lease of the tenant for life, and the confirmation of the remainder-man; and he ought so to have declared, 1 Inst. 45 a. So if two joint-tenants, two tenants in common, or tenant for life, and he in the remainder, join in the grant of a copyhold, one fine only is due, and it shall enure as one grant only; so if a surrender be made, and after a common recovery is had by plaint, in the nature of a writ of entry, for better assurance,—one fine only shall be paid: Co. Copyholder, 162, 163. [Butler, 266.]

(a) If tenant for life, and he in the remainder or reversion, join in a feoffment by deed, the freehold passes from the tenant for life, and the deed of feoffment amounts to a grant of the reversion; but in the case here propounded by Lord Coke (which is to be understood

On joint-fee-
ment by dis-
seisor and
disseisee, it
operates as to
the disseisor,
as a confir-
mation.

And it is to be observed that Littleton here putteth a descent, so as the entry of the disseisee is not lawful ; for if the disseisor and disseisee join in a charter of feoffment, and enter into the land, and make livery, it shall be accounted the feoffment of the disseisee, and the confirmation of the disseisor.

LITTLETON.
[Sect. 516.
296 a.]

3. Confirmation,
by and
to whom to be
made.

Confirmation
by the donor
to the lessee
for years of
his tenant for
life, is good,
(though a re-
lease would
be void.)

LITTLETON.
[Sect. 517.
296 a.]

AND in some case a deed of confirmation is good and available, where in the same case a deed of release is not good nor available. As if I let land to a man for term of his life, who letteth the same to another for term of forty years, by force of which he is in possession ; if I by my deed confirm the estate of the tenant for years, and after the tenant for life dieth during the term of (9) years, I cannot enter into the land during the said term.

YET if I by my deed of release had released to the tenant for years in the life-time of the tenant for life, this release shall be void, for that then there was not any privity between (10) me and the tenant for years ; for a release is not available to the tenant for years, but where there is a privity between him and him that releaseth (H).

296 a.
(522)*

*This belongeth to the first diversity between a release and a confirmation.

49 E. 3. 32.

(1 Rol. Abr.
482.)
9 H. 6. 22. tit.
Release, 44.

Littleton in this chapter putteth eight diversities between a confirmation and a release (1); and thereof for illustration here he putteth two cases in these sections, which, upon that which hath been said in the precedent chapters, is sufficiently explained. Only in both these cases this is to be observed, that where a confirmation shall enlarge an estate, there privity is required, as well as in the case of the release, as by many examples which Littleton puts in this chapter appeareth. And note, here is the first case wherein a release and a confirmation do differ.

(Cro. Car. 264.
1 Rol. Abr.
483. 500. Mo.

Lessee for life made a lease for thirty years, and after the lessor and lessee for life made a lease for sixty years to another, which

(9) forty, added L. and M. and Roh.

(10) *moy et le tenant a terme d'ans—by et moy, L. and M. and Roh.*

at common law), as a reversion cannot pass by parol, the law will construe the fee to be executed in the lessor by an implied surrender of the estate for life.—[Ed.]

(H) For the effect of such release would be to enlarge the estate of the lessee by giving him a freehold estate for his life, and, we have seen, that the reversioner or remainder-man cannot by release enlarge a particular estate, created out of another particular estate, during the subsistence of the interposed estate, ante, 272 b. p. 499. n. (2 2); for the privity during that period will be between the lessee in the under-lease, and his lessor ; and not between the under-lessee and the person, who has the reversion or remainder, expectant on that interest, which originally was the particular estate. 2 Prest. Conv. 352, 353. But where, as in the instance here put, tenant for life leases for a long term of years absolutely, and the estate of the lessee is confirmed by the reversioner, the lessee will have an absolute instead of a determinable interest ; his lease will be derived out of the estate for life, while that estate continues, and will be binding on the estate of the reversioner, whenever that estate commences in possession. Ante, 45 a. p. 431. 2 Prest. Conv. 133, 134.—[Ed.]

(1) And he also states eight instances in which a release and a confirmation agree.—[Ed.]

lease for sixty years the lessor did first confirm, and after the lessor confirmed the lease for thirty years; and after tenant for life died within the thirty years; and it was adjudged (*d*), that the lease for thirty years was determined by the death of lessee for life, and that the lessee for sixty years might enter; for that albeit the lease for sixty years was the latter in time, yet was it of greater force in law, for that the lessor, who had power to confirm which of them he would, did first confirm the second lease.

67. Dy. 218b.
Hob. 165.
Ante, 310 a.)
(*d*) Inter Un-
wel & Lodge,
temp. Reg.
Eliz. (Hob. 7.)

In this chapter is also to be observed eight cases, wherein a release and a confirmation have the like operation in law.

IN the same manner it is, if I be disseised, and the disseisor make a lease to another for term of years, if I release to the termor this is void: but if I confirm (11) the estate of the termor, this is good and effectual (κ).

LITTLETON.
[Sect. 518.
296 b.]
Confirmation
by disseisee
to his dissei-
sor's leasee
for years is
good (secus
as to a re-
lease).
(523)*
296 b.

* Here is the second diversity between a release and a confirmation.

ALSO, if I being within age let land to another for term of twenty years, and after he granteth the land to another for term of ten years so he granteth but parcel of his term: in this case when I am of full age, if I release to the grantee of my lessee, &c. this release is void, because there is no privity between him and me, &c. (L). But if I confirm his estate, then this confirmation is good. But if my lessee grant all his estate to another, then my release made to the grantee is good and effectual (1) (M).

LITTLETON.
[Sect. 547.
308 a.]
Confirmation
by infant lea-
sor at full age
to the lessee
of his tenant
for years, is
good (secus
as to a re-
lease).
(Ant. 296.)

(11) *l'estate de termor,—son estate, L. and M. and Roh.*

(κ) For in releases by enlargement, the releasor, we have seen, must have a vested estate, ante, p. 499. n. (z 2); and in this case the releasor has not any estate, but merely a right or interest. The proper assurance between these parties is a confirmation of title; but the release, it is supposed, may operate as such confirmation. 2 Prest. Conv. 351.—[*Ed.*]

(L) The estate of an under-lessee cannot be enlarged by a release from the original reversioner during the continuance of the interposed estate; because the privity during that period is not between the under lessee and the original reversioner, but between the under-lessee and his lessor, since an under-lease necessarily leaves a reversion in the grantor. This doctrine is material, not only with reference to the learning of estates, which may be enlarged by release; but also to the remedies by action of covenant, which run with the estate, and to conditions in restraint of assignment, but not extending to under-leases; for an under-lease will not be a breach of a condition, to avoid the lease on assignment, *Kinnersley v. Orpe*, Dougl. 56, 57. 184: nor can the lessor in the original lease maintain debt or covenant against an under-lessee, though he might have maintained these remedies in case there had been an assignment instead of an under-lease. *Holford v. Hatch*, Dougl. 183. 2 Prest. Conv. 127. Ante, p. 331. n. (g 3).—[*Ed.*]

(1) So *Crusoe, d. Blencowe v. Bugby*, 3 Wilson, 204. Henry Blencowe and Mary his wife, seised in fee, demised to William Alder for 21 years with a proviso for re-entry on default of payment of the rent, or breach of any of the covenants. Among other covenants, there was one from William Alder,—^α that he should not assign, transfer, or set over, or otherwise do or put away the indenture of demise, or the premises thereby demised, or any part thereof, to any person or persons whomsoever, without the consent of the said Henry Blencowe and Mary his wife, their heirs and assigns in writing, under his, her, or their hands and seals, first had and obtained for doing thereof.—William Alder, without any

7 E. 4. 6 b.
18 E. 4. 2.
9 H. 7. 24.
(Cro. Jac. 320.
Sid. 42. 1 Rol.
729, 730.

Here are two things to be observed: First, that the lease of infant in this case is not void but voidable. Secondly, this is the case put by Littleton, wherein the release and confirmations differ.

LITTLETON.
[Sect. 528.
300 a.]
Confirmation
by patron
and ordinary
of a grant of
rent-charge
by a parson,
was good (at
common
law.)
(524)*

ALSO, if a parson of a church charge (12) the glebe land his church by his deed, and after the patron and ordinary firm the same grant, and all that is comprised in the grant, then the grant shall stand in his force, according to the purport of the same grant. But in this case it behoveth the patron hath a fee-simple in the advowson; for if he hath an estate for life, or in tail, in the advowson, then the grant shall not stand, but during his life, and the life of the parson who granted, &c.

300 b.
Diversities as
to confirma-
tion of grants
by ecclesiastical persons,
at common
law.
7 H. 4. 15.
(Mo. 67.)

Here are divers things to be noted. First, that the confirmation is of the grant, which in deed is but a mere assent by deed to the grant; and therefore it is holden, that if there be a parson, patron and ordinary, and the patron and ordinary give license by deed to the parson to grant a rent-charge out of the glebe, and the parson granteth the rent-charge accordingly, this is good, and shall bind the successor; and yet here is no confirmation subsequent, but license precedent.

(1 Rol. Abr.
479. 481.)

Secondly, the ordinary alone, without the dean and chapter, may agree thereunto, either by license precedent, or confirmation subsequent; for that the dean and chapter hath nothing to do with the grant, which the bishop doth as ordinary, in the life-time of the bishop.

(e) 19 El. Dy.
356, 357. 11.
H. 6. 9. 33 H.
8. 11. Charge.
Br. 58. (Post,
329 a.)

Thirdly, (e) but if the bishop be patron, there the bishop cannot confirm alone, but the dean and chapter must confirm also; for the advowson or patronage is parcel of the possession of the bishoprick; and therefore the bishop, without the dean and chapter, cannot make the grant good, but only during his own life, after the decease of the incumbent, either by license precedent, or confirmation subsequent.

(12) *le—un*, L. and M. and Roh.

license demised to John Bugby for 14 years.—It was held, that there was no *privity of contract* between the original lessor and Bugby the under-lessee. So that it was an under-lease and not an assignment; and therefore no breach of the covenant, and see 1 Strange, 405. See also *Gregson v. Harrison*, 2 Term. Rep. p. 425. *Kinnerley v. Orpe* and others. (Doug 56.)—[Butler, Note 271.]

(M) For whenever a release would have been good to a lessee or donee, before assignment, it will, after assignment, be good to his assignee. 2 Prest. Conv. 348. So, although a derivative estate cannot be enlarged by a release to the under-lessee, while the estate of the lessor, who granted the estate of the under-tenant, shall be continuing, yet, when the estate is determined, as it may be by merger, surrender, &c. without defeating the estate of the under-tenant (for the rule of *cessante statu primitivo cessat derivativus* admits of these exceptions), then it should seem from principle, that there will arise a connexion between the under-tenant and the person who has the next vested estate, so that the relation of lord and tenant will exist between them for the purposes of waste, surrender, and merger, and of consequence, to enable the person who was an under-tenant, and who is now discharged from that relation, to become a releasee in enlargement of his estate. 1b. 345.—[Ed.]

A. parson of D. is patron of the church of S. as belonging to his church, and presents B., who, by consent of A. and of the ordinary, grants a rent-charge out of the glebe; this is not good to make the rent-charge perpetual, without the assent of the patron of A., no more than the assent of the bishop who is patron, without the dean and chapter, or no more than the assent of the patron, being tenant in tail, or for life, as Littleton saith. And Littleton here saith, that the patron that *confirms must have a fee-simple, meaning to make the charge perpetual (x). And Littleton after saith, that in the case of the parson the fee is in abeyance, and seeing the consent of the patron is in respect of his interest, as here it appeareth by Littleton, he may consent upon condition; otherwise it is of an attornment, because that is a bare assent. Also if the estate of the patron be conditional, and he confirmeth, and after the condition is broken, his confirmation is void.

See more of these kinds of confirmations in my Reports.
Lib. 2. 39 & 24.
Lib. 1. 153.
Lib. 4. 23, 24.
Lib. 5. 41, 31.
81. Lib. 10. 6.
Lib. 11. 19.
Lib. 6. 34.
(Ant. 274 b.
Post. 297 a.
Sid. 75.)
(525)*

Fourthly, he that is patron must be patron in fee-simple; for if he be tenant in tail, or tenant for life, his confirmation or agreement is not good to bind any successor, but such as come into the church during his life. But if the patron be tenant in tail, and discontinue the estate in tail, the lease shall stand good during the discontinuance; or, if the estate tail be barred, it shall stand good for ever.

31 E. 3.
Grant. 61. 26
Ass. 38. 8 E.
Dy. 252. Vid.
lib. 3. fol. 73.
Le case de
deane &
chapter de
Norwich. (1
Lev. 112. 1
Rol. Abr. 482.
2 Rol. Abr.
333.)
12 H. 4. 11.
19 E. 3. 7.
7 Eliz. Dyer.
238. 11 H. 6. 9.
10 Eliz. Dy.
6 E. 3. 10.
2 E. 3. 29.
9 E. 4. 6.
2 H. 4. 11.
38 E. 3. 19.
25 E. 3. 54.

But here is to be observed a diversity between a sole corporation, as parson, prebend, vicar, and the like; that have not the absolute fee in them, for to their grants the patron must give his consent. But if there be a corporation aggregate of many, as dean and chapter, master, fellows, and scholars of a college, abbot or prior, and convent, and the like, or any sole corporation that hath the absolute fee, as a bishop with consent of the dean and chapter, they may by the common law make any grant of or out of their possessions, without their founder or patron, albeit the abbot or prior, &c. were presentable: and so it is of a bishop, because the whole estate and right of the land was in them, and they may respectively maintain a writ of right.

If a bishop hath two chapters, and he maketh a grant, both chapters must confirm it, or else the successor shall avoid it. But if one of the chapters be dissolved, then the confirmation of the other sufficeth; but it needeth not the confirmation of the king, who is founder and patron of all bishopricks (1).

*301 a.
Tempe R. 2.
tit. Grant. 104.
50 E. 3. tit.
Assise. Stat.
ham. 11 Eliz.
Dyer. 232.
(526)*

And note a diversity between a confirmation of an estate, and a confirmation of a deed; for if the disseisor make a charter of feoff-

Diversity between a confirmation of

(x) An annuity granted by a prebendary after admission and institution, and before induction, and which grant the bishop confirmed before induction, was adjudged to be void; for before induction the prebend has not the freehold either in deed or in law. Plowd. 528. So, if a bishop collated to a prebend, and died, and before induction the king confirmed it, it was void; for he had nothing in the prebend till induction. 1 Rol. Abr. 483. 3 Com. Dig. Confirmation (D 1.)—[Ed.]

(1) For the confirmation of leases made by ecclesiastical persons, see Bacon Abr. tit. Leases. [Butler.] Ante, p. 428. and the notes there.—[Ed.]

an estate, and
a confirma-
tion of a deed.

ment to A. with a letter of attorney, and before livery the disseisee confirm the estate of A. or the deed made to A., this is clearly void, though livery be made after. But if a bishop had made a charter of feoffment with a letter of attorney, and the dean and chapter before livery confirm the deed, this is a good confirmation, and livery made afterwards is good. And so it hath been adjudged.

The like law is of a confirmation of a deed of grant of a reversion before attornment.

In the same manner it is if a bishop at the common law had granted lands to the king in fee by deed, and the dean and chapter by their deed confirm the deed of the bishop, and after the deed of the bishop is inrolled, this is good, albeit the confirmation of the dean and chapter be not enrolled; for the assent upon the matter is made to the bishop.

33 E. 3. Con-
firm. 22. 31
E. 3. Abb. 10.
21 H. 7. 1.
Vid. Sect. 393
& 643.
(f) 13 Eliz.
cap. 10. 1 El.
cap. 19. 18 El.
cap. 11. 1 Jac.
cap. 3. Vid.
sect. 593 &
648.
(*) Lib. 2. fol.
46. Lib. 4. 76
& 120. Lib. 5.
9. 6. 14. Lib.
6. 37. Lib. 7.
8. Lib. 11. 67.

But this confirmation that Littleton here speaketh of, must be made in the life, and during the incumbency of the person; and so in the life of the bishop, or of any other sole corporation. But it is to be known, that grants made by persons, prebends, vicars, bishops, masters and fellows of any college, dean and chapter, master or guardian of any hospital, or any having any spiritual or ecclesiastical living, are restrained by (f) divers acts of parliament, so as they cannot grant any rent-charge, or to make any alienation, or to make any leases other than such as are mentioned in those acts, which you may read at large, and the exposition upon the same, in my (*) Commentaries.

LITTLETON.
[Sect. 530.
301 a.]
(527)*

ALSO, if there be a perpetual chauntry, wherewith the ordinary hath nothing to do or meddle; quære, if the patron of the chauntry, and the chaplain of the same chauntry, may charge the chauntry with a rent-charge in perpetuity.*

301 a.
Vid. Sect. 648.
(Cro. Jac. 63.)
(10 Rep. Lam-
pet's case.)
(Post. 344.)
*301 b.

This is meant of a chauntry donative wherewith the ordinary hath not to deal, and by this grant, when Littleton wrote, the chauntry should have been charged forever, because no other had any interest in this chauntry, *save only the patron and chauntry priest, and the grant is made *concurrentibus hiis quæ in jure requiruntur*. But since Littleton wrote, all, and all manner of free chapels and chauntries perpetual, whereof Littleton here speaks, are by (g) acts of parliament given to the crown, and the bodies politic thereof dissolved. See hereafter section 648. more at large of all this present section.

LITTLETON.
[Sect. 592.
301 a.]
Confirmation
by donor of a
grant of rent-
charge made
by his tenant
for life, is
good.

ALSO, if a man letteth land for term of life, the which tenant for life charge the land with a rent in fee, and he in the reversion confirm the same grant, the charge is good enough and effectual.

301 a.
Diversity
herein where

Here is a diversity to be observed, where the determination of the rent is expressed in the deed, and when it is implied in law.

For when tenant for life granteth a rent in fee, this by law is determined by his death; and yet a confirmation of the grant by him in the reversion makes that grant good for ever, without words of enlargement, or clause of distress, which would amount to a new grant. And yet if the tenant for life had granted a rent to another and his heirs by express words, during the life of the grantor, and the lessor had confirmed that grant, that grant should determine by the death of tenant for life.

the determination of the rent is expressed in the deed, and when it is implied in law. 26 Ass. pl. 28. 45 Ass. pl. 13. Lib. 1. fol. 147. Anne May-owe's case. (1 Rol. Abr. 483.) 14 Ass. pl. 14.

Tenant for life upon condition grant a rent in fee, the lessor confirm the grant, and after the condition is broken, the lessor re-enter, he shall not avoid the grant.

LITTLETON. [Sect. 519. 296 b.]

*ALSO, if I be disseised, and I confirm the estate of the disseisor, he hath a good and rightful estate in fee-simple, albeit in the deed of confirmation no mention be made of his heirs, because he had a fee-simple at the time of the confirmation. For in such case if the disseisee confirm the state of *the disseisor, to have and to hold to him and his heirs of his body engendered, or to have and to hold to him for term of his life, yet the disseisor hath a fee-simple, and is seised in his demesne as of fee, because when his estate was confirmed, he had then a fee-simple, and such deed cannot change his estate, without entry (13) made upon him, &c.*

4. Confirmation, how it shall enure. When to the whole estate of the confirmee. (528) *

On confirmation by disseisee to disseisor of his estate, it enures in fee, though without words of inheritance; (5 Rep. 81.) and although made in tail, or for life only:

296 b. 19 H. 6. 22. 6 E. 3. Confirmation. 4.

Here is the first case wherein the release and confirmation doth agree, viz. a confirmation to a disseisor in tail, or for any particular estate, is of the like force as a release to a disseisor, during such estate, which in both cases is good for ever.

IN the same manner it is, if his estate be confirmed for term of a day, or for term of an hour, he hath a good estate in fee-simple, for this, that (14) his estate in fee-simple was once confirmed. Quia confirmare idem est, quod firmum facere, &c.

LITTLETON. [Sect. 520. 297 a.] or but for an hour.

Here is the second case wherein the release and confirmation do agree. The reason of this is, for that the disseisor hath a fee-simple; and therefore if his estate be confirmed but for an hour, it is good for ever, because (saith Littleton) *confirmare idem est, quod firmum facere*.

297 a.

In the same manner it is, if the disseisor make a gift in tail, and the disseisee confirm the estate of the donee for the life of the donee, this confirmation enures to the whole estate tail; for a confirmation can make no fraction of any estate, to extend but to part of the estate only, *Et sic de cæteris* (r).

296 b. On confirmation to disseisor's donee in tail of his estate for his life, it enures to the whole estate tail.

(13) *fait*, not in L. and M. nor Roh.

(14) *son*, not in L. and M. nor Roh.

(r) See n. (q) *infra*.—[*Ed.*]

297 a.
Diversity
herein be-
tween the
confirmation
of a term for
years, and
that of an es-
tate of free-
hold.
Lib. 5. fol. 81.
Forde's case.
(Ant. 274 a.)
(Ante, 300 b.)
(529)*

(1 Rol. Abr.
412.)

Nota, a diversity between a bare assent without any right or interest, and an assent coupled with a right or interest; and therefore an attornment cannot be made for a time nor upon condition; but if the parson make a lease for a hundred years, the patron and the ordinary may confirm fifty of the years, for they have an interest, and may charge in time of vacation. *And so if a disseisor make a lease for an hundred years, the disseisee may confirm parcel of those years; but then it must be by apt words, for he must not confirm the lease, or demise, or the estate of the lessee, for then the addition for parcel of the term should be repugnant when the whole was confirmed before, but the confirmation must be of the land for part of the term. So may the confirmation be of part of the land; as if it be of forty acres, he may confirm twenty, &c. So if tenant for life make a lease for an hundred years, the lessor may confirm either for part of the term, or for part of the land. But an estate of freehold cannot be confirmed for part of the estate, for that the estate is entire, and not several, as years be (q).

LITTLETON.
[Sect. 521.
297 a.]
In respect of
other per-
sons.
On confirma-
tion of the es-
tate of the
particular te-
nant, it does
not enure to
the remain-
der-man, (se-
cus as to a re-
lease.)

ALSO, if my disseisor maketh a lease for life, the remainder over in fee, if I release to the tenant for life, this shall enure to him in the remainder. But if I confirm the estate of the tenant for term of life, yet after his decease I may well enter, because (15) nothing is confirmed but the estate of the tenant for life, so that after his decease I may enter. But when I release all my right to the tenant for life, this shall enure to him in the remainder or in the reversion, because all my right is gone by such release.

297 a.

Here is the third case wherein the release and confirmation differ, for the confirmation to the tenant for life doth not enure to him in the remainder (a).

(15) *nul*, added L. and M. and Roh.

(q) A confirmation to a disseisor of his estate for an hour passes the fee without the word "heirs," because the disseisor acquires by the disseisin a tortious fee-simple; and when that estate is assented to, the disseisee can never afterwards destroy it. And according to the old books, if he confirm the *estate, lease, demise, or term*, of the lessee of the disseisor for some part of the years, he cannot defeat it during the whole term, because the whole interest of the lessee is confirmed; and the clause restricting it in point of time, after confirming it absolutely, must be rejected as repugnant. But if the *land* be confirmed for part of the term, the assent is but partial, and not to the whole estate, and therefore it cannot, contrary to the express words, be carried any further. Gilb. Ten. 76. However, in modern times, this distinction seems to have been exploded. See *Plowden v. Cartwright*. 1 Burr. 282. *Earl of Derby v. Taylor*, 1 East. 502. 2 Prest. Conv. 166. But an estate of freehold cannot be confirmed, though by express words, for part of that estate; for an estate of freehold is considered as integral and indivisible. It does not consist, like a term of years, of an aggregate or number of separate portions of time; but is, of itself, an entire and individual estate. Watk. Gilb. Ten. 76. 392. Shep. Touch. 317.—[Ed.]

(a) If a man releases to tenant for life all his right, this enures to him in the remainder, because he parts with his whole; and he that has but an estate for life by the feudal conveyance, cannot have the whole fee, as is said; but if a man confirm the estate for life, it is an approbation and assent to that estate only, and therefore the assent being no farther than to the estate for life, it cannot be carried to strengthen the remainder: but if he had confirmed the remainder, that had confirmed the estate for life by implication, because the

*And so it is, when the several estates be in one person; as if the disseisor make a gift in tail, the remainder to the right heirs of tenant in tail; if the disseisee confirm the estate in tail, it shall not extend to the fee-simple, no more than if the disseisor had made a gift in tail, the remainder for life, the remainder to the right heirs of tenant in tail; this extendeth only to the estate tail, and not *to the remainder for life, nor to the remainder in fee. But if the disseisor make a lease for life to A. and B., and the disseisee confirm the estate of A., B. shall take advantage thereof; for the estate of A. which was confirmed was joint with B., and in that case the disseisee shall not enter into the land, and devest the moiety of B.

(530)*

*297 b.

On confirmation of the estate of one joint-tenant, it enures to both. (Ante, 52 a.) (Ante, 310 a. 315 a. 319 a.) (1 Rol. Abr. 302.) (Sld. 83.)

If the disseisor infeoffs A. and B. and the heirs of B., if the disseisee confirm the estate of B. for his life, this shall not only extend to his companion, as hath been said, but to his whole fee-simple, because to many purposes he had the whole fee-simple in him, and the confirmation shall be taken most strong against him that made it.

(1 Cro. 321.) (Ante, 182.)

Tenant in tail discontinueth in fee, and dieth, the discontinuée make a lease for life, and granteth the reversion to the issue, he shall not have a formedon against tenant for life; for by his formedon he must recover the estate of inheritance, and the lessee for life hath not the inheritance, but the issue in tail himself hath it.

If feoffee upon condition make a lease for life, or a gift in tail, and the feoffor release the condition to the feoffee, he shall not enter upon the lessee or donee, because he cannot regain his ancient estate.

(Ante, 202 a.)

If the feoffee upon condition make a lease for life, the remainder in fee, if the feoffor release the condition to the *lessee for life, it shall enure to him in the remainder; as well as in the case of the right, or of a rent, &c.

*(531)

If a feme disseissoress make a feoffment in fee to the use of A. for life, and after to the use of herself in tail, and the remainder to the use of B. in fee, and then taketh husband the disseisee, and he releaseth to A. all his right, this shall enure to B. and to his own wife also; for by the rule of Littleton it must enure to all in the remainder (1).

But if A. letteth to B. for life, and B. maketh a lease to C. for his life, the remainder to A. in fee, A. releaseth to C. all his right, this is good to perfect the estate of C. for his life. But when C. dieth, A. shall be in of his old estate, for his release could not enure to

remainder cannot be without the particular estate to support it, and the confirmation of the remainder must imply an assent to all means necessary to support it. Gilb. Ten. 76, 77.—[Ed.]

(1) For, though a man cannot contract with his wife, or transfer any interest to her, yet she may, by construction of law, take benefit of his release made to a third person, and enuring by way of extinguishment. Hawk. Abr. 394. [Butler, Note 257.]

himself to perfect his defeasible remainder, but his ancient right remaineth. And note, that in these two cases the fee is divested and vested all at one instant; in the same manner as if tenant in tail make a lease for life, at the same instant the estate tail is divested out of the donee, and the reversion in fee out of the donor, and a new fee vested in tenant in tail. And so if the husband make a lease for life of his wife's land, he divesteth his own estate, that he hath in her right, and the inheritance of his wife, and at the same instant vested a new reversion in fee in himself.

LITTLETON.
[Sect. 521.
297 a.]
On confirmation of the estate of the remainderman, or reversioner, it enures to the particular tenant.

BUT in this case, if the disseisee confirm the estate and title of him in the remainder, without any confirmation made to tenant for life, the disseisee cannot enter upon the tenant for term of life, for that the remainder is depending upon the state for life; and if his estate should be defeated, the remainder should be defeated by the entry of the disseisee, and it is no reason that he by his entry should defeat the remainder against his confirmation, &c.

(532)*
297 b.
Vid. 29 Ass.
17. 38 H. 8.
Recov. en
Value. Br. 20.
13 E. 3. Entr.
Cong. Br. 127.
Fl. Com.
Delamere's
case. Vid.
sect. 374.
*298 a.
(Mo. 91.)

"But in this case, if the disseisee confirm the estate and title of him in the remainder." Here is the third case, wherein the release and confirmation do agree, *for the confirmation *made to him in the remainder shall avail the tenant for life, as much as the release shall.

Reported by
Sir John Pop-
ham, Chief
Justice. (Post,
302 a.) (6 Rep.
41.) (Sid. 360.)
(1 Saund. 149.
159. Ante,
224 a.)

"For that the remainder is depending, &c." By this some have gathered, that if a disseisor make a lease for life, reserving the reversion to himself, and the disseisee confirmeth the state of the disseisor, that he may enter upon the lessee, because the estate of him in the reversion dependeth not upon the state for life as the remainder; but all is one, for by the confirmation made to him in the reversion, all the right of him that confirmeth is gone, as well as when he maketh it to him in remainder; and he cannot by his entry avoid the estate of the lessee for life, but he must avoid the state of the lessor, which against his own confirmation he cannot do; and it hath been adjudged, that if a disseisor make a lease for life, and after levy a fine of the reversion with proclamations, and the five years pass, so as the disseisee is for the reversion barred, he shall not enter upon the lessee for life.

LITTLETON.
[Sect. 522.
298 a.]
On confirmation of the estate of one of two disseisors, it enures to both—(though otherwise of a release):
298 a.

ALSO, if there be two disseisors, and the disseisee releaseth to one of them, he shall hold his companion out of the land. But if the disseisee confirm the estate of the one, without more (16) saying in the deed, some say that he shall not hold his companion out, but shall hold jointly with him for that (17) nothing was confirmed but his estate, which was joint, &c.

This is the fourth case, wherein the release and confirmation seem to differ, being made unto one of the disseisors.

(16) *dire—parlance*, L. and M. and Roh.

(17) *nul*, added L. and M. and Roh.

"*Confirmed but his estate, &c.*" Hereby it appeareth, that if the disseisee confirm the estate of the one disseisor in the lands, to have and to hold the lands or tenements, or the right of the disseisee, to him and his heirs, he shall hold out the other disseisor; and that appeareth by Littleton, first, upon these words (*confirm the state of one*) without more saying in the **deed*, viz. to have and to hold the lands, &c. Secondly, the reason of Littleton in express words is, for that nothing was confirmed but his estate, which was **joint* (τ). Thirdly, the next two sections make it plain where the *habendum* is added.

Secus if the habendum be to hold the land to him and his heirs.

*298 b.

(533)*

Hereby also it appeareth, that a release is more forcible in law than a confirmation.

AND for this some have said, that if two joint-tenants be, and the one confirm the estate of the other, that he hath but a joint estate, as he had before. And this confirmation leaveth the state as it was, and doth not amount to any severance of the jointure, as some have said.) But if he hath such words in the deed of confirmation, to have and to hold to him and to his heirs all the tenements, whereof mention is made in the confirmation, then he hath a sole estate in the tenements, (18) &c. (v). (This is plain and evident enough.) And therefore it is a good and sure thing in every confirmation to have these words; to have and to hold the tenements, &c. in fee, or in fee tail, or for term of life, or for term of years, according as the case (19) is, or the matter lieth.

LITTLETON.
[Sect. 523.
298 b.]

When it ensures to enlarge the estate of the confirmee. On confirmation by one joint-tenant of the estate of his companion, his estate is not enlarged:

[COKE,
298 b.]

secus if the habendum be to hold the tenements to him and his heirs.

[COKE,
298 b.]

34 E. 3. ut.
Confr. pl. 15.
298 b.

"*And therefore it is a good and sure thing, &c.*" This is good counsel, and worthy to be observed.

*FOR to the intent of some, if a man letteth land to another for life, and after confirm his estate which he hath in the same land, to have and to hold his estate to him and to his heirs, this confirmation as to his heirs is void, for his heirs cannot have his estate (vide section 650), which *was (20) not but for term of his life. But if he confirm his estate by these words, to have the*

LITTLETON.
[Sect. 524.
298 b.]

On confirmation of the estate of tenant for life,

(534)*
habendum his estate to him and his heirs, his es-

(18) &c. not in L. and M. nor Roh.

(19) est, not in L. and M. nor Roh.

(20) ne, not in L. and M. nor Roh.

(τ) If a man confirms the estate to one of the disseisors, he only has the estate as he first had it, which was jointly with the other disseisor; but if he confirms the estate of one disseisor in the lands, to have and to hold the lands, or his right, to him and to his heirs, then such disseisor shall hold out his companion; for such *habendum* explains the manner of his confirmation, viz. that he should not hold the estate merely as it is, but in a manner more beneficial for him, that is, that he should hold the possession, which he has *per my et per tout*, to him only; for the *habendum* explains the assent, viz. that he should hold the possession sole, so that the possession in the whole being confirmed to him only, he has the total right to such possession, and therefore may hold out his companion. Gilb. Ten. 77, 78.—[Ed.]

(v) But in such case the assurance operates as a release, which is the proper mode of conveyance by one joint-tenant to his companion, and not as a confirmation. Fitz. Abr. Confirm. 15. Shep. Touch. 314. Watk. Gilb. Ten. 78. Ante, vol. 1. p. 764. n. (x).—[Ed.]

tate is not enlarged:
[Coke,

299 a.]

secus if it be to hold the land to him and his heirs.

298 b.

(1 Rol. Abr. 432.) 18 E. 3.

40. (Flo.

158 a.)

*299 a.

same land to him and to his heirs, this confirmation maketh a fee-simple in this case to him in the land, for that (21) the words to have and to hold, &c. goeth to the land, and not to the estate which he hath, &c.

Here the diversity is apparent, between a confirmation of the estate for life in the land to have and to hold the said state in the land to him and his heirs, this cannot enlarge his *estate, for his estate being but for life, that estate cannot be extended to his heirs. But in that case if he confirm the state for life in the land in the premises, of the deed, and the *habendum* is of this sort, to have and to hold the land to him and his heirs, this shall enlarge his estate, and create in him a fee-simple (w). Wherein is to be noted, (h) that the *habendum* and the premises do in substance well agree together, and that the *habendum* may enlarge the premises, but not abridge the same (1).

And seeing that in conveyances, limitations of remainders are usual and common assurances, it is dangerous by conceits or nice distinctions to bring them in question, as have in latter time been attempted.

LITTLETON.
[Sect. 525.

299 a.]

On confirmation to baron and feme lease for life for their lives, the husband's estate is enlarged by way of remainder for life, if he survive:

(535)*

299 b.

Pl. Com. Colthirst's case. Doct. & Stud. ca. 21.

ALSO, if I let certain land to a feme sole for term of her life, who taketh husband, and after I confirm the estate of the husband and wife, to have and to hold (22) for term of their two lives; in this case the husband doth not hold jointly with his wife, but holdeth in right of his wife for term of her life. But this confirmation shall enure to the husband by way of remainder for term of his life, if he surviveth his wife.

*"By way of remainder, &c." Here some question hath been made of this term remainder, without any cause at all, because in law it is in nature of a remainder. For in case of a fine, when a reversion expectant upon an estate for life in A. is granted to B., *et quæ ad ipsum reverti debent post mortem A. præfato B. et hæredibus suis remaneant, &c.* and a more colourable exception might be taken against this word *remaneant* there, than in the case of Littleton.

(*) 16 H. 6. ult. Release 45.

(i) 9 E. 4. 18.

(k) 6 E. 3. 9.

(l) 17 E. 3. 68 b.

It is true, that in the (*) 16 H. 6. it is called a reversion: (i) 9 E. 4. it is called a remainder: in (k) 6 E. 3. it is said, that by the confirmation an estate accrued to the husband for term of his life. In (l) 17 E. 3. the husband, living the wife, shall have nothing but in abeyance after the death of his wife. But lest there should be

(21) *les parols*—k, L. and M. and Roh.

(22) *la terre*, added L. and M. and Roh.

(w) For, by these words, "to have and to hold the land to him and his heirs," there appears to be a further intent than merely to confirm the estate, viz. to enlarge it to him and his heirs; and taking the grant strongest against the grantor, it must pass away the fee-simple. Gilb. Ten. 78.—[Ed.]

(1) On the operation of an *habendum* in a deed, see ante, 21 a. Vin. Abr. Grant, J. K. L. and M.

pugna verborum, which learned and wise men ever avoid, all do resolve, that the estate of the husband is good, and that it doth enure by way of increase and enlargement of his estate. And albeit in this case of Littleton, the husband by the confirmation gaineth an estate for life in remainder, (as Littleton termeth it) yet if the husband doth waste, an action of waste shall lie against him and his wife, notwithstanding the mean remainder, because the husband himself committeth the waste, and doth the wrong; and therefore shall not excuse himself for his committing of waste, in respect he himself hath the remainder; no more than if a man leaseth to A. during the life of B. the remainder to him during the life of C., if he commit waste, an action of waste shall lie against him (r).

17 E. 3. 68 b.
Vid. Paget's
case, lib. 5.
fol. 76 b.
(Ante, 54 a.)

Here is the fourth case wherein the release and confirmation do agree; and in this case it is to be observed, that the baron hath such an estate in the land in the right of his wife, as he is capable of a confirmation to enlarge his estate (1); *and therefore if the confir-

299 a.
Vid. sect. 573.
(Sid. 83. 361.)
(2 Rol. Abr.
329.)
(526)*
So if made to

(r) With respect to the distinction between the cases where an estate for life is enlarged to an estate in fee, by the release or confirmation of the reversioner, or remainder-man, and those cases where a person being seised of an estate for life, the inheritance is afterwards conveyed or devised to his right heirs, by a subsequent deed or will, in which case the estate of the ancestor is not enlarged by the subsequent conveyance or devise to his right heirs; see ante, p. 145. n. (P). Fearn. Cont. Rem. 99.—[Ed.]

(1) It is necessary to distinguish between the cases mentioned by Littleton and Sir Edward Coke, in this and the succeeding chapter, where an estate for life is enlarged to a fee, by the *release*, or *confirmation* of the reversioner, or remainder-man, and those cases where a person being seised of an estate for life, the inheritance is afterwards conveyed or devised to his right heirs, by a subsequent deed, or will. It appears by the case of *Moore v. Parker*, 1 Lord Raym. 37. 4 Mod. 316. Skinn. 558. and *Fonnereau v. Fonnereau*, Doug. Rep. 1 vol. 470. that the estate of the ancestor is not affected by the subsequent conveyance or devise to his right heirs. For though it is a rule, that where the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift, or conveyance, an estate is limited, either mediately or immediately to his heirs in fee, or in tail, "*the heirs*," in such cases, are words of limitation of the estate, and not words of purchase; yet this applies only to those cases where both the limitations are by the same instrument. In some cases the freehold of the ancestor has resulted to him by implication; but still the deed from which that implication resulted was the deed in which the limitation to his heirs was expressed; so that the implied estate of freehold, and expressed estate of inheritance, arose at the same time, and under the same deed, which brings it within the general rule. But suppose an estate is limited to A. for life; remainder to such uses as B. shall appoint, and afterwards B. in the life-time of A. appoints the estate to A.'s right heirs; it is difficult to say, whether in that case, the estates will unite or not. This case has sometimes occurred in practice, but has not yet been the subject of any judicial determination. To prove the union of the two estates, it may be contended, that the deed by which the power is executed, must be considered as part of the deed by which the power is given; and the use limited by the execution of the power derives its effect and is fed by the seisin of the releasees or feoffees of the deed containing the power; that the uses limited in the original deed to take effect in default of an execution of the power, are subject to that power; that the uses limited under, or by virtue of the power, precede, and take place of them, in the same manner as if in the original deed, not the power, but the use under the power, had been inserted; and that though the uses vest at different times, yet they may be considered as virtually created at the same time. On these grounds, the proposed case may be contended to resemble the case put, 378 b. that if lands be given to two during their joint lives, with the immediate remainder to the right heirs of him who shall die first, there, both the estates are created at the same time, but the inheritance does not vest till a subsequent period: yet Sir Edward Coke expressly says, that the heir, in that case, takes by descent. Between the cases, however, there is this difference, and it may be thought important, that in the

him and his heirs, it enures to him in fee, after her decease. (Ante, 273b.) 16 H. 6. tit. Release 45. 22 E. 3. tit. Release. Statham.

*299 b. (4 Rep. 29.) But on confirmation to them and their heirs, it enures to them jointly in fee, and the husband is seised in right of his wife for her life. 18 E. 3. 20. (1 Rol. Rep. 230. 317. 433. 3 Leo. 4 a. On lease to husband and wife to hold one moiety to him for life, and the other moiety to her for life, a confirmation to them and their heirs enures to him in fee as to his moiety, and to them jointly as to the other moiety. 18 Ass. p. 3. 18 E. 3. Confirmation. 17. 17 E. 3. 63. 28 E. 3. 94. 40 E. 3. 8 Ass. 20. But on such lease and confirmation to two men, they are tenants in common of the inheritance; so if the lessor confirms to his lessee for life and remainderman for life, to hold to them and their heirs;

(537)*

mation had been made of his estate to him alone, to have and to hold, the land to him and to his heirs, this had been good to have conveyed the fee-simple to him after the decease of his wife: for if in this case a release be made to the husband and his heirs, this is sufficient to convey the inheritance of the land to the husband (A 1).

"Doth not hold jointly with his wife." For two causes. First, because *the wife hath the whole for her life. Secondly, joint-tenants must (as hath been before said in the Chapter of Joint-tenants) come in by one title. But in this case if the confirmation had been made to the husband and wife, to have and to hold the land to them two and to their heirs, they had been joint-tenants of the fee-simple, and the husband seised in the right of his wife for her life; for the husband and the wife cannot take by moieties during the coverture.

Ante, 184 a. 187 a. Post, 351 a.)

If a man letteth land to the husband and wife, to have and to hold the one moiety to the husband for term of his life, and the other moiety to the wife for her life, and the lessor confirm the estate of them both in the land, to have and to hold to them and to their heirs; by this confirmation, as to the moiety of the husband, it enureth only to the husband and his heirs, for the wife had nothing in that moiety; but as to the moiety of the wife, they are joint-tenants, as hath been said; for the husband hath such an estate in his wife's moiety, in her right, as is capable of a confirmation. But if such a lease for life be made to two men by several moieties, and the lessor confirm their estates in the land, to have and to hold to them and to their heirs, they are tenants in common of the inheritance; for regularly the confirmation shall enure according to the quality and nature of the estate which it doth enlarge and increase.

If a lease for life be made to A. the remainder to B. for life, and the lessor confirm their estates in the land, to have and to hold to them and their heirs; A. taketh one moiety to him and his heirs, and therefore of the one moiety he is seised *for life, the remainder to B. for life, and then to him and his heirs: of the other moiety A. is seised for life, the immediate inheritance to B. and his heirs: because as to the moiety which B. takes, the same is executed: as if the reversion be granted to tenant for life, and to a stranger, it is

case put by Lord Coke, the limitation of the inheritance was confined to the heirs of the preceding tenant for life, so that there never was an instant when it was not certain that the remainder in fee would, in the contemplation of law, attach in one or other of them so far as to make his heir take by descent; and thus each tenant for life had a contingent remainder or possibility in fee. But in the case proposed in this annotation, no such contingent remainder or possibility existed in A. the tenant for life.—Sec. 271 b. note 1. VII 2. Since the publication of this note in the former editions of this work, the subject has received a masterly investigation by Mr. Fearn. See his Essay on Contingent Remainders, 6th Edit. p. 74.—[Butler, Note 261.]

(A 1) With respect to the interest which the husband acquires in his wife's property by marriage, see the notes to fol. 351 a. post.—[Ed.]

executed for one moiety, (as hath been said before) and therefore in this case they are tenants in common. 30 H. 6. 9.
(Ante, 182 b.)

If lands be given to two men, and to the heirs of their two bodies begotten, and the donor confirmeth their two estates in the land, to have and to hold the land to them two and to their heirs: in this case some are of opinion, that they shall be joint-tenants of the fee-simple, because the donees were joint-tenants for life, and (say they) the confirmation must enure according to the estate which they have in possession, and that was joint. But others hold the contrary. For, first, they say, that the donees have to some purposes several inheritances executed, though between the donees survivor shall hold for their lives. Secondly, they say, that when the whole estate, which comprehendeth several inheritances, is confirmed, the confirmation must enure according to the several inheritances, which is the greater and most perdurable estate, and therefore that the donees shall be tenants in common of the inheritance in this case.

BUT if I let land to a feme sole for term of years, who taketh husband, and after I confirm the estate of the husband and his wife, to have and to hold the land for term of their two lives: in this case they have a joint estate in the freehold of the land, for that the wife had no freehold before, &c.

This is the fifth case, wherein the release and confirmation do agree: and it is to be observed, that chattels real, as leases for years, *wardships, and the like, are not given to the husband absolutely (as all chattels personal are), by the intermarriage, but conditionally if the husband happen to survive her, and he hath power to alien them, at his pleasure: but in the meantime the husband is possessed of the chattels real in her right.

*Secondly, that the husband hath such a possession in her right of the chattel, as is capable of a confirmation, or of a release.

Thirdly, that the confirmation in this case to the husband and wife for their lives, maketh them joint-tenants for life, because a chattel of a feme covert may be drowned: and so note a diversity between a lease for life and a lease for years made to a feme covert; for her estate of freehold cannot be altered by the confirmation made to her husband and her, as the term for years may, whereof her husband may make disposition at his pleasure (B 1).

(s 1) In either case of a lease for years or for life, to the feme, it amounts to a new grant of the term for the life of the husband; for the confirmor not only confirms the old term, but erects a new one, since the words import more than a confirmation of the old term; for in that the husband has nothing in his own right. Gilb. Ten. 79. So where a man seised of a rent-charge in fee, granted it over to a feme sole for a term of years, and the tenant attorned, and she took husband; if the grantor during the term confirmed the rent to the husband and wife for their lives, or in fee, they became joint-tenants for life, or in fee, of the rent, and no new attornment was necessary. Vaugh. 46.—[Ed.]

or where, after a gift in special tail to two men, the donor confirms to them and their heirs.

Vid. sect. 573.

LITTLETON.
[Sect. 526.
299 b.]

On confirmation to baron and feme lessee for years for their lives, it enures to them jointly for life.

299 b.
5 E. 3. 17 b.
Pl. Com. 418 b.
38 H. 6. 23.
14 H. 4. 12.
38 E. 3. 33.
Pl. Com.
Dane Hale's case. 50 Ass.
p. 15. 4 H. 6.
k. 7 H. 6. 1.
9 H. 6. 52. 37
L. Ass. 21 H.
7. 29. 21 E. 4.
40. 26 H. 8. 7.
(Ante, 40 b.
351 a.)

*300 a.
(538)*
(Ante, 273 b.
Ante, 276 a.
Ante, 299 a.)

LITTLETON.
[Sect.532.
302 a.]
On confirma-
tion to tenant
for years to
hold the land
for his life,
&c., his es-
tate is en-
larged for
life, &c.:
(Sid. 453.)
302 a.

ALSO, if I let lands to a man for term of years, by force whereof he is (23) in possession, &c. and after I make a deed to him &c. quodd dedi et concessi, &c. the said land, to have for term of his life, and I deliver to him the deed, &c. then presently he hath an estate in the land for term of (24) his life.

Here is the sixth case, wherein the confirmation and the release do agree, and is evident, and needeth no explication.

LITTLETON.
[Sect.533.
302 a.]

AND, if I say in the deed, to have and to hold to him and to his heirs of his body engendered, he hath an estate in fee-tail. And if I say in the deed, to have and to hold to him and to his heirs, he hath an estate in fee-simple. For this shall enure to him by force of the (25) confirmation to enlarge his estate.

(539)*
302 a.

*This also is evident, and needeth no explication, saving that whensoever a confirmation doth enlarge and give an estate of inheritance, there ought to be apt words (as Littleton here expresseth them) used for the same.

LITTLETON.
[Sect.545.
307 b.]
secus if the
confirmation
be of his es-
tate without
saying more.
LITTLETON.
[Sect.546.
307 b.]
Diversity
herein in the
case of a re-
lease.

ALSO, if I let land to a man for term of years, and after I confirm his estate without putting more words in the deed, by this he hath no greater estate than for term of years, as he had before.

BUT if I release to him all my right which I have in the land without putting more (26) words in the deed, he hath an estate of freehold (c 1). (27) So thou mayest understand (my son) divers great diversities between releases and confirmations.

307 b.

In these two sections is the seventh case, wherein a release and a confirmation do differ.

LITTLETON.
[Sect.548.
308 a.]
Confirmation
of a grant of
a rent newly
created, to
hold to the
grantee in
fee, is void to
enlarge his
estate:
(Sid. 285.)
(Mo. 30.)

ALSO, if a man grant a rent-charge, issuing out of his land to another for term of his life, and after he confirmeth his estate in the said rent, to have and to hold to him in fee-tail or in fee-simple; this confirmation is void as to enlarge his estate, because he that confirmeth hath not any reversion in the rent.

(23) *en possession, &c. possessione*, L. and M. and Roh.

(24) *sa*, not in L. and M. nor Roh.

(25) *confirmation—confirmament*, L. and M. and Roh.

(26) *parols*, not in L. and M. nor Roh.

(27) *et*, added in L. and M. and Roh.

(c 1) Acc. ante, 272 b. p. 509. But the lessee, in this case, must have previously entered; for under a lease at common law the lessee has only an *interesse termini* till entry, which, we have seen, is no estate, and consequently no foundation for a release by enlargement. Ante, p. 499, 500. n. (q 2). But where an estate for years is created by bargain and sale under the statute of Uses, the lessee has an estate immediately, without entry. Ante, 270 a. 502. n. (p 3).—[Ed.]

Here the diversity is apparent, between a rent newly created and a rent in *esse* (p 1): which needeth no explication. Only this is to be observed, that Littleton intendeth his deed of confirmation not to contain any clause of distress; for otherwise, as to the confirmation the deed is void, but the clause of distress doth amount to a new grant, as in the Chapter of Rents hath been said.

**BUT if a man be seised in fee of rent-service or rent-charge, and he grant the rent to another for life, and the tenant attorneth, and after he confirmeth the estate of the grantee in fee-tail, or in fee-simple, this confirmation is good, as to enlarge his estate according to the words of the confirmation, for that he which confirmed (28) at the time of the confirmation had a reversion of the rent.*

(540)*
LITTLETON.
[Sect.549.
308 a.]
secus in the case of a rent-service or rent-charge in esse.
*308 b.
(Ante, 366 a.
Finch. 234.)
308 b.

Here is the eighth case, wherein the release and confirmation doth agree: and it is here to be observed, that to the grant of the estate for life, Littleton doth put an attornment, because it is requisite (x 1); but to the confirmation to the grantee of the rent to enlarge his estate, there is none necessary, and therefore he putteth none; but of this more is said in the Chapter of Attornment, section 556, 557 (f 1).

BUT in the case aforesaid, where a man grants a rent-charge to another for term of life, if he will that the grantee should have an estate in tail, or in fee, it behoveth that the deed of grant of the rent-charge for term of life be surrendered or cancelled, and then to make a new deed of the like rent-charge, to have and perceive to the grantee in tail or in fee, &c. Ex paucis (29) plurima concipit ingenium.

LITTLETON.
[Sect.550.
308 b.]

"Surrendered or cancelled." Note, by cancellation of the deed the rent which lieth only in grant ceaseth (as here it appeareth) as well as by the surrender (a 1). And the reason **wherefore* (if the

308 b.
Vid. sect. 636.
(Civ. Car. 399.)
(541)*

(28) *Pestate*, added L. and M.

(29) *plurima concipit ingenium—dictis, &c.*
L. and M.

(p 1) As to the difference between an interest newly created, and an interest in *esse*, see ante, p. 248. n. (c).—[*Ed.*]

(x 1) That is, at common law, before the 4 & 5 Ann. c. 16.—[*Ed.*]

(f 1) Ante, p. 367—370.—[*Ed.*]

(a 1) Since the Statute of Frauds, 29 Car. 2. c. 3. s. 3. the mere cancellation of an instrument will not defeat the estate created by it. See *MacGennis v. McCullough*, Gilb. Eq. Rep. 235. *Roe v. Archbishop of York*, 6 East. 86. Et vid. *Leach v. Leach*, 2 Ch. Rep. 52. And even if the instrument would from its nature be revocable by cancellation, yet if the cancellation be made through a mistake in fact, or even, it is said, through a mistake in law, the mistake will annul the cancellation. *Perrott v. Perrott*, 14 East. 423. Sugd. Pow. 393. Cancellation, however, destroys a will executed under a power. *Id.* 321. It may be further observed, that if an instrument be altered by rasure or otherwise in a material part by the person for whose benefit it was intended, the deed becomes absolutely void. *Whelpdale's case*, 5 Co. 119 a. But though it was formerly held, that a rasure by a stranger would have the same operation, (*Pigott's case*, 11 Co. 27 a.), it is now settled that an alteration by a stranger, without the privity or consent of the party interested, will not avoid an instrument, no more than if it had been obliterated or cancelled by mistake.

Ante, 148 a.
226 b. 10
Rep. 66.
Plowd. 227 a.
Post, 338.
1 Vent. 287.)

grantor make a new grant of the rent, and not enlarge it by way of confirmation, as Littleton must be intended) the deed should be surrendered as cancelled, is, lest the grantor should be doubly charged, viz. with the old grant for life, and with the new grant in fee; or, as hath been said, the grantor may grant to the grantee for life and his heirs, that he and his heirs shall distrain for the rent, &c. and this shall amount to a new grant, and yet amount to no double charge, whereof you may see before in the Chapter of Rents.

LITTLETON.
[Sect. 537.
300 a.]

5. Confirmation of a rent-charge not avoided, though the estate out of which it issued be afterwards defeated, by the entry of the confirmor;

300 a.
(m) 11 H. 7.
28. Lib. 1.
fol. 147. Anne
Mayow's
case. 3 H. 4.
10.

ALSO, if my disseisor granteth to one a rent-charge out of the land whereof he disseised me, and I rehearsing the said grant confirm the same grant, and all that which is comprised within the same grant, and after I enter upon the disseisor; quære, in this case, if the land be discharged of the rent or no (30).

This is the fifth case, wherein the release and confirmation do differ; for a release to the grantee in this case (m) were void. It is holden by some authority since Littleton wrote, that the disseisee after his re-entry shall not avoid the rent-charge against his own confirmation: and there a general rule is taken, that such a thing as I may defeat by my entry, I may make good by my confirmation.

Lib. 1. fol. 147,
148. Anne
Mayow's
case. (Post,
sect. 523.)
or by his re-
covery in an
action.

If the feoffee upon condition grant a rent-charge in fee, and the feoffor confirmeth it, and after the condition is broken, and the feoffor enter, he shall not avoid the rent-charge. And so it is, if the heir of the disseisor grant a rent-charge, and the disseisee confirmeth it, and after recover the land, he shall not avoid the rent (n 1); and yet in neither of *these cases his entry was congeable at the time of his confirmation.

(542)*

(30) &c. added L. and M. and Roh.

Henfree v. Bromley, 6 East. 310. *French v. Patton*, 9 East. 351. See further as to rature and alteration of deeds, Vin. Abr. Ffaits, T. U. U. 2. X. X. 2. 1 Wood's Conv. 806, 809, and the books cited ante, p. 232, 233. n. (13).—[Ed.]

(n 1) The confirmation, in the above instances, is good, though the estate is gone, out of which the grant confirmed was derived; for since the disseisee has consented to the estate which has a being from the disseisor or disseisor's heir, he cannot afterwards destroy it. Gilb. Ten. 79. So if the mortgagee makes a lease for years, and the mortgagor confirms it, and afterwards the condition is performed, the lease shall not be avoided. *Englefield's case*, 7 Co. 14 a. So tenant in tail makes a lease for life, now he hath gained a new fee by wrong, and afterwards he grants a rent-charge, or makes a lease for years, and afterwards tenant for life dies, he shall not avoid his charge or lease, although he be in of another estate, because he had a defeasible possession and ancient right, the which, if they be in several hands, should be good, as the lease of one and the confirmation of the other; and being in one hand shall be as much in judgment of law. Ibid. Et vid. Moor. 325. Poph. 50. 1 Co. 147 b. Bro. Condition, 249. 2 Rol. Rep. 320. Post. 343 a. Upon the principle abovementioned, if lessee for life grants a rent in fee, and the lessor confirms it, the rent remains, though the estate for life be determined. Supra, sect. 529. p. 527. 1 Rol. Abr. 483. So if lessee for life upon condition grants a rent, which the lessor confirms, and afterwards enters for the condition broken, yet the rent remains. Supra, 300 a. p. 541. But if the person who confirmed had only a particular estate, his confirmation determines with his estate: as if a patron, being only tenant for the life of B., confirmed a lease of the parson, the confirmation determined when B. died. 2 Rol. Abr. 9.—[Ed.]

*ALSO, if there be lord and tenant, (32) albeit the lord confirm the estate which the tenant hath in the tenements, yet the seignory remaineth entire to the *lord as it was before.*

LITTLETON.
[Sect. 535.
304 b.]
*305 a.

tion does not give distinct rights. On confirmation by the lord of the estate of his tenant, yet the seignory remains.
(Sld. 175. 176.) (Doc. Pla. 70. 118. 136. 138. 204.) (11 Rep. 52 a.)

IN the same manner it is, if a man hath a rent-charge out of certain land, and he confirm the estate which the tenant hath in the land, yet the rent-charge remaineth to the confirmor.

LITTLETON.
[Sect. 536.
305 a.]

So in the case of a confirmation of the estate of the

tenant, by the grantee of a rent-charge, or common, yet the rent-charge, or common, remains.

IN the same manner it is, if a man hath common of pasture in (33) other land, if he confirm the estate of the tenant of the land, nothing shall pass from him of his common; but notwithstanding this, the common shall remain to him, as it was before.

LITTLETON.
[Sect. 537.
305 a.]

Here is the sixth case, wherein the release and confirmation do differ; for by the release, the seignory, rent-charge, or common, are extinct (1 1). And so these three sections be *evident, and need no explication, saving that some do gather upon these two last sections, and the next ensuing, that a man cannot abridge a rent-charge or common of pasture by a confirmation, as he may do a rent-service in respect of the privity between the lord and tenant, so as (say they) a tenure may be abridged by a confirmation, but not a rent-charge or common: and therefore Littleton beginneth the next section with an adverb adversative, vix. (*but*), &c. But a man may release part of his rent-charge, or common, &c. (1 1).

305 a.

Diversity
herein in the
case of a re-
lease.
(643)*

If the disseisee and a stranger disseise the heir of the disseisor, and the disseisee confirm the estate of his companion, this shall not extinguish his right that was suspended: so as if the heir of the disseisor re-enter, the right of the disseisee is revived. And so it is, if the grantee of a rent-charge, and an estranger disseise the tenant of the land, and the grantee confirm the estate of his companion, the tenant of the land re-enter, the rent is revived; for the

298 b.

7. Confirma-
tion does not
extinguish a
right in sus-
pense.

(32) *mesque—et*, L. and M. and Roh.

(33) *en—ou*, L. and M. and Roh.

(1 1) The lord by his confirmation strengthens or establishes the estate which the tenant already had, but he does not pass his right to the seignory, because the confirmation or assent to that estate cannot be interpreted to pass that other distinct right which is in him, since the assent to one estate is no reason to conclude that he has parted with the other; but if he had released all his right, he had thereby extinguished his seignory, because by such remitting his right, he could not have demanded any thing. Gilb. Ten. 79, 80.—[Ed.]

(1 1) So a confirmation does not give any collateral qualities: and therefore, if a husband alone levies a fine, where husband and wife are seised in special tail, remainder to the husband in fee, and the conusee confirms the estate of the wife; this does not make her estate descendible to the issue, who are barred by the fine. 9 Co. 142. 3 Com. Dig. Confirmation (D 2).—[Ed.]

confirmation extended not to the rent suspended ; otherwise it is of a release in both cases.

LITTLETON.
[Sect. 538.
305 a.]

8. On confirmation by the lord to his tenant, the services may be abridged, but new services cannot be reserved.

305 b.
Britton, fol.
57. 177. 40 E.
3. 21. 47. 48.
18 E. 3. 26.
50 Ass. 6.
14 H. 4. 8.

(544)*
(Ante, 76 a.)

BUT if there be lord and tenant, which tenant holdeth of his lord by the service of fealty and 20 shillings rent, if the lord by his deed confirm the estate of the tenant, to hold by 12 pence, or by a penny, or by a half-penny: in this case the tenant is discharged of all the other services, and shall render nothing to the lord, but that which is comprised in the same confirmation.

"And shall render nothing to the lord, but that which is comprised, &c." Which words are thus to be understood; that the tenant shall not render any more rent or annual service to the lord than is contained in the deed; but other things, notwithstanding the said confirmation, the tenant shall yield to the lord, as relief, *aide pur file marier*, and *aide pur faire fitz chivaler*, because these are incidents to the tenure *that remain, and shall not be discharged without special words, by the general words of all other actions, services, and demands. And so if a man hold of me by knight-service, rent, suit, &c. and I release to him all my right in the seignory, excepting the tenure by knight-service, or confirm his estate to hold of me by knight-service only for all manner of services, exactions, and demands; yet shall the lord have ward, marriage, relief, *aide pur file marier*, *et pur faire fitz chivaler*, for these be incidents to the tenure that remain. But it is holden, that if a man make a gift in tail by deed, reserving two shillings rent *a luy et ses heires pro omnibus et omnimodis servitiis, exactionibus secularibus, et cunctis demandis*, if the donee die his heir of full age, the donor shall have no relief, because in the original deed of the gift in tail it is expressly limited, that by the service of two shillings rent he shall be quit of all demands (and relief lieth in demand); and by reason of those words, say they, there cannot any relief become due; but some do hold the contrary in that case.

13 R. 2. tit.
Avowrie, 89.
Nota dictum.
Fitzh.
(Ante, 23 a.)

305 a.
28 E. 3. 92. 93.
29 Ass. 37.
6 Elix. Dyer,
230 b. 7 E. 4.
26 a. 21 E. 4.
62. per Brian.
10 E. 3. tit.
Avowrie, 100.
(9 Rep. 33.)

And the reason wherefore no service of another can be reserved upon the confirmation is, because as long as the state of the land continueth, it cannot by the confirmation of the lord be charged with any new service. So as it is evident that the lord by his confirmation may diminish and abridge the services, but to reserve upon the confirmation new services he cannot, so long as the former estate in the tenancy continueth.

Privy necessary to a confirmation abridging services.
*305 b.

7 E. 3. 19. 22
E. 3. 18 b.

And as, where a confirmation doth *enlarge an estate in land there ought to be privy, as hath been said; so regularly, where a confirmation doth abridge services, there ought to be privy also.

And therefore here Littleton putteth his case of lord and tenant, between whom there is privy. And therefore if there be lord, mesne, and tenant, the lord cannot confirm the estate of the tenant, to hold of him by lesser services, but this is void, for that there is no privy between them, and a confirmation cannot make such an alteration of tenures.

* And the case in 4 E. 3. maketh nothing against this opinion: (545)*
 for there the case in substance is this: John de Bonville held certain
 lands of Ralfe Vernon, and before the statute of *quia emptores*
terrarum, levied a fine of the same lands to the abbot of Cogsall
 and his successors, to hold of the chief lord (which was Ralfe Ver-
 non) by the services due and accustomed. Ralfe Vernon made a
 charter to the said abbot in these words: *Concessi etiam eidem*
abbati et successoribus suis relaxavi et quietum clamavi totum
jus, &c. quod habeo, vel potero habere in omnibus tenementis
quæ idem abbas habet de dono Johannis de Bonville, tenendum
de me et hæredibus meis in puram et perpetuam eleemosinam;
 and adjudged, that it was a good tenure in frankalmoign; which
 case proveth nothing that the lord paramount may by his confirma-
 tion to the tenant peravail extinct the mesnalty (as it is abridged by
 Master Fitzherbert in the title of Confirmation, pl. 21.), for the
 immediate lord did there make the said charter, and not any lord
 paramount. (And therefore it is ever good to rely upon the book
 at large, for many times *compendia sunt dispendia* and *melius*
est petere fontes, quàm sectari rivulos). And of this opinion was
 Master Plowden upon good advisement and consideration.

And here is the seventh case, wherein the release and confirmation 4 E. 3. 19.
 doth agree; for if there be lord and tenant by fealty and twenty 9 E. 3. l. 12
 shillings rent, the lord may release all his right in the seignory or E. 4. 11. 16
 in the tenancy, saving fealty and ten shillings rent: but he cannot E. 3. Fines, 4.
 save a new kind of service, for he may as well abridge his services 6 Eliz. Dyer,
 upon a release as upon a confirmation. And as there is required 230.
 privacy when the lord abridgeth the services of his tenant by his
 confirmation; so must there be also, when the lord by his release
 abridgeth the services of his tenant. And therefore the lord para- (Ante, 47 a.
 mount cannot release to the tenant peravail saving to him part of his (Flo. 563 b.)
 services (L 1); but the saving in that case is void (M 1).

* BUT if the lord will by his deed of confirmation, that the (546)*
 tenant in this case shall yield *to him a hawk or a rose yearly LITTLETON.
 at such a feast, &c. this (34) confirmation is void, because he [Sect. 539.
 reserveth to him a new thing which was not parcel of his services 305 b.]
 before the confirmation: and so the lord may well by such con- *306 a.

(34) Confirmation—reservation, L. and M. and Roh.

(L 1) That a saving in an act of parliament, which is repugnant to the body of the act, is void, see Plowd. Com. 563; as where the supposed attainder of the Duke of Norfolk was by act of Parliament, 1 Mary, declared to be void and null *ab initio*, saving the estates and leases made by King Edw. 6. that saving was void; for when the attainder was declared to be void, the said saving was against the body of the act, and therefore void, 1 Co. 47 a. That a saving will serve for any thing that is implied in a judgment, but not against an express judgment; see 3 Inst. 47.—[Ed.]

(M 1) But in the case of lord, mesne, and tenant, if the lord confirmed the estate of the mesne to hold by less services, it was good, for he was in possession of the mesnalty, and there was a privacy between them. Bro. Confirmation, pl. 8. 6 Vin. Abr. 399. Confirmation (E a.)—[Ed.]

firmation abridge the services (35) by which the tenant holdeth of him, but he cannot reserve to him new services (N 1).

306 a. This upon that which hath been said before in the next preceding section is evident, and needeth no further explication.

LITTLETON.
[Sect. 540.
306 a.]

*ALSO, if there be lord, (36) mesne, and tenant, and the tenant is an abbot, that holdeth of the mesne by certain services yearly, the which hath no cause (37) to have acquittance against his mesne, for to bring a writ of mesne, (38) &c. in this case, if the mesne confirm the estate that the abbot hath in the land, to have and to hold the land unto him and his successors in frankalmoign, or free alms, &c. in this case this confirmation is good, and then the abbot holdeth of the mesne in frankalmoign. And the cause is, for that no new service is reserved, for all the services specifically specified be extinct, and no rent is reserved (39) to the mesne, but (40) the abbot shall hold the land of him as it (41) was before the *confirmation; for he that holdeth in frankalmoign ought to do no bodily service; so that (42) by such confirmation it appeareth, the mesne shall not reserve unto him any new service, but that the lands shall be holden of him as it was before. And in this *case the abbot shall have a writ of mesne, if he be distrained in his default, by force of the said confirmation, where per case he might not have (43) such a writ before.*

306 b.

4 E. 3. 19.
22 E. 3. 15 b.
the Lord
Wake's case.
10 E. 3. 5.
15 E. 3. Con-
firmat. 8.

Here our author having seen the former books putteth his case, that the mesne maketh the confirmation to hold in frankalmoign, and not the lord paramount.

4 E. 3. 19. 20.
F. N. B. 136 b.
& q. 4 E. 4. 36.
31 E. 1.
Meane, 55.
11 E. 3. Avow-
rie 100. 22 E.
3. 18 b. 30 E.
3. 13. 16 H. 3.
Avow. 243. (9
Rep. 130.)

LITTLETON.
[Sect. 541.
306 b.]

"And in this case the abbot shall have a writ of mesne." Here it is to be noted, that upon a confirmation to hold in freealmoign there lieth a writ of mesne, albeit the cause of acquittal begin after the seignor. And so upon such a confirmation the tenant shall have, *contra formam feoffamenti*.

(35) *per quecumq; le tenant tient de luy*, not in L. and M. nor Roh.

(36) *mesne—mesme*, L. and M. but not in Roh.

(37) *per cas*, added L. and M. and Roh.

(38) *&c.* not in L. and M. nor Roh.

(39) *al mesne*, not in L. and M. nor Roh.

(40) *que*, not in L. and M.

(41) *il—a lui*, L. and M. and Roh.

(42) *que*, not in L. and M. nor Roh.

(43) *un—tiel*, L. and M. and Roh.

(N 1) The lord may abridge the services of his tenant by his confirmation, but he cannot enlarge them or create new services; for when he has confirmed the estate by lesser services, he has granted to the tenant the services that are over and above what was specified in the confirmation: because confirming the estate to hold by lesser services, is, by implication, a grant or release of the rest; for he could not hold by lesser services, unless the rest were released, see *Doe, d. Reay v. Huntington*, 4 East. 271; but if he confirms to hold by greater or new services, this is void, because this does not amount to a new grant from the lord. Gilb. Ten. 80.—[Ed.]

villain (44) there where he hath no right to have him as his villain, and after I confirm to him the estate which he hath in my villain, this confirmation seemeth to be void, for that none may have possession of a man as of a villain in gross, but he which hath right to have him as his villain in gross. And so inasmuch as he, to whom the confirmation was made, was not seised of him as of his villain at the time of the confirmation made, such confirmation is void.

9. Confirmation of a void estate, is void. Where a person takes away a villain in gross from his owner, a confirmation to him of his estate in the villain, is void.

Here is to be observed a diversity between the custody of the body of a ward within age, and a right of inheritance in the body of a villain in gross; for a man may be put out of possession of the custody of his ward, but not of his villain in gross, no more than a man can be of his prisoner which he hath taken in war.

306 b.
45 E. 3. 10.
30 H. 6. tit.
Barre, 59.
Registrum,
102. 1 H. 6.
cap. 5.

Also of things that are in grant, as rents, commons, and the like, it is at the election of the party whether he will be *disseised of them or no, as shall be said after in his proper place. But of a villain in gross, he cannot at all be disseised. (n) *Non valet confirmatio nisi ille qui confirmat sit in possessione rei vel juris unde fieri debet confirmatio, & eodem modo nisi ille cui confirmatio fit, sit in possessione.*

(Post, 323 a.)
Brooke, tit.
Proprie, 28.
(Sect. 589,
590, 591.)

(549)*
(n) Bracton,
lib. 2. 69 b.
24 E. 3. tit.
Discont. 16.
42 E. 3. 13.
40 E. 3. 17.
43 E. 3. 4.
9 E. 4. 38.

And materially doth Littleton put his case of a villain in gross; for of a villain regardant to a manor, the lord may be put out of possession; for by putting him out of possession of the manor, which is the principal, he may likewise be put out of possession of the villain regardant, which is but accessory. And by the recovery of the manor the villain is recovered. But if another doth take away my villain in gross or regardant, he gaineth no possession of him. And this doth well appear by the writ of *nativo habendo*, for that writ is not brought against any person in certain (because no man *can gain the possession of him). But the writ is to this effect: *Rex vic' salutem. Præcipimus tibi, quod justè et sine dilatione habere facias A. B. nativum et fugitivum suum, &c. ubicunque inventus fuerit, &c. et prohibemus super forisfacturam nostram ne quis eum injustè detineat*; so as detain him one may, but to possess himself of him, and to dispossess the lord, he cannot.

Dyer, 10 Eliz.
Growche's
case.
Diversity
herein in the
case of a vil-
lain regard-
ant to a man-
or;

(Ante, 303 a.)
*307 a.

And if a man might have been dispossessed of a villain in gross, or of a villain regardant (unless he be dispossessed of the manor also, as hath been said), the law would have given a remedy against the wrong-doer, as the law doth in the case of a ward.

(o) Bracton,
fol. 243. Brit-
ton, fol. 126.
(6 Rep. 11 b.
Ante, 77 a.
121 b.)
(*) 9 E. 4. 38.
3 H. 4. 15.
18 E. 3. 44.
16 E. 3. Quar.
Imp. 146.
19 H. 2. Tres.
255. 19 H. 6.
33. 21 H. 6. 9.
28 H. 6. 33.

Now, seeing it doth appear by our books (o), and by Littleton himself by implication, speaking only of a villain in gross that if a man be disseised of the manor whereunto the villain is regardant, he is out of possession of his villain, and so an advowson appendant, and the like. Hereby Littleton putting his case of a villain in gross and by divers authorities a point controverted in our books (*) is

(44) *la ou il n'avoit aucun droit d'aver luy come son viltaine*, not in L. and M. nor Rob.

5 H. 7. 36. 38.
10 H. 7. 9.
F. N. B. 33. 9.
22 H. 6. 33.
per Moyle.
30 E. 3. 31.
39 E. 3. 21.
43 E. 3. 12.
(Plowd. 258 a.
Ante, 122 b.
Post, 349 b.
363 b.)

(549)*
(p) Bracton,
fol. 242, 243.
Britton, fol.
126. Flata,
acc.

LITTLETON.
[Sect. 542.
307 a.]
or where the
deed of con-
firmation
enures by
way of grant.
307 a.
2 H. 6. F. N.
B. 77 a. b.
24 E. 3. Dis-
count. 16.

resolved, viz. that by the grant of the manor without saying *cum pertinentiis*, the villain regardant, advowson appendant, and the like, do *pass; for if the disseisor shall gain them as incidents to the manor, whose estate is wrongful, *à multo fortiori* the seoffee, who cometh to his estate by lawful conveyance, shall have them as incidents. But where the entry of the disseisee is lawful, he may seise the villain regardant, or present to the advowson, &c. before he enter into the manor: otherwise it is where his entry is not lawful; and so are the ancient authors (p) to be intended (o 1).

BUT in this case, if these words were in the deed (45), &c. Sciatis me dedisse et concessisse (46) tali, &c. talem villanum meum, this is good; but this shall enure by force and way of grant, and not by way of confirmation, &c.

Here it is to be observed, that a man hath an inheritance in a villain, whereof the wife of the lord shall be endowed, as hath been said; for in him a man may have an estate in fee or fee-tail for life or years. And therefore Littleton is here to be understood, that in the grant there were these words (*his heirs*) or else nothing passed but for life, as of other things that lie in grant.

LITTLETON.
[Sect. 543.
307 a.]

AND (47) sometimes these verbs dedi et concessi shall enure by way of extinguishment of the thing given or granted; as if a tenant hold of his lord by certain rent, and the lord grant by his deed to the tenant and his heirs the rent, &c. this shall enure to the tenant by way of extinguishment, for by this grant the rent is extinct, &c.

*307 a.
3 E. 3. 12. &
3 Ass. 7.

And this grant of the rent shall enure by way of release.

LITTLETON.
[Sect. 544.
307 b.]
(2 Rol. 406.)

(550)*

*IN the same manner it is (48), where one hath a rent-charge out of certain land, and he grant to the tenant of the land the rent-charge, &c. And the reason is, for that it appeareth, by the words of the grant, that the will of the donor is, that the tenant shall have the rent, &c. And inasmuch as *he cannot have or perceive any rent out of his own land, therefore the deed shall be intended and taken for the most advantage and avail for the tenant that it may be taken, and this is by way of extinguishment.*

307 b.
34 H. 6. fol. 41.
(Ante, 280 a.)

But if the grantee of the rent-charge granteth it to the tenant of the land and a stranger, it shall be extinguished but for the moiety: and so it is of a seignory.

296 b.
Confirmation
of estate of
lessee for

If the disseisor make a lease for years to begin at Michaelmas, and the disseisee confirm his estate, this is void, because he hath but

(45) &c., not in L. and M. nor Roh.
(46) *tali*, not in L. and M. nor Roh.

(47) *Et—item*, L. and M. and Roh.
(48) *un—home*, L. and M. and Roh.

interesse termini, and no estate in him, whereupon a confirmation may enure (P 1).

years before
entry, is void.
4 H. 7. 10. by
Read. 22 E.
4. 36.

CHAP. XLII.*

(551)*

SAME SUBJECT.

OF A SURRENDER.

SURRENDER (A), *sursum redditio*, properly is a yielding up an estate for life, or years, to him that hath an immediate *estate in re-

337 b.
Definition of
a surrender.
(552)*

(P 1) So a confirmation, made by him who has nothing at the time, is not good: as if tenant in tail and the issue in tail join in a grant of the next avoidance, and the tenant in tail dies, this is not a confirmation by the issue in tail, for he had nothing at the time. 1 Rol. Abr. 482. So a confirmation shall not have relation to the prejudice of another: as if a parson makes a lease, and afterwards the patron being bishop grants the next avoidance to A., and it is confirmed by the dean and chapter, and afterwards the lease is by them confirmed; the presentee of A. shall avoid the lease, for the grant to A. was before the confirmation of the lease. Hob. 7. So the subsequent presentee shall avoid it: for being avoided by the presentee of A., it shall be void as to all his successors. Ibid. 3 Com. Dig. 144. Confirmation (D 4) (D 5).—[Ed.]

(A) A surrender is of a nature directly opposite to a release; for as that operates by the greater estate descending upon the less, a surrender is the falling of a less estate into a greater. As a surrender is, generally, for the advantage of the surrenderee, the law will often presume his assent to it; and it has been held, that a surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee; for this is a conveyance at common law, to the perfection of which, no other act but the bare grant is necessary; and, though it be true that every grant is a contract, and there must be an *actus contra actum*, or a mutual consent, yet that consent is implied. A gift imports a benefit, and an *assumpsit* to take a benefit may well be presumed: and there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest a property; or sealing a bond to another in his absence should be the obligee's bond immediately, without notice. *Thompson v. Leach*, 2 Salk. 618. But the particular tenant cannot enforce the surrender upon the remainder-man, who disagrees to it. 2 Vent. 207. But if the surrenderee do once agree to it, he cannot afterwards disagree; for his first agreement perfects the surrender. The actual entry of the surrenderee into the land is not necessary. And therefore if tenant for life, or years, surrender to him in reversion out of the land, and he agree to it, he has the land in him presently. And yet he cannot bring an action of trespass for any trespass done upon the land, until he has made his entry. Shep. Touch. 307, 308. The technical and proper words of a surrender, are, surrender and yield up. But any form of words, by which the intention of the parties is sufficiently manifested, will operate as a surrender. *Smith v. Mapleback*, 1 T. R. 441. Thus, if a lessee for years remise, release, discharge, and for ever quit claim to his lessor all his right, title, or interest, in or to such lands, it will amount to a surrender. Perk. sect. 607. So, if lessee for life leases to the lessor for the life of the lessee, this is a surrender. 2 Rol. Abr. 497. Livery of seisin is not necessary to a surrender, because there is a privity of estate between the surrenderor and surrenderee; for the particular estate of the one, and the remainder of the other, are, in fact, one and the same estate; and livery having been once made at the creation of it, there can be no necessity for a second livery. 2 Bl. Com. 326. A surrender might formerly have been by parol; but by the Statute of Frauds, 29 Car. 2. c. 3. it is enacted, that no lease, estate, or interest of freehold, or term of years, or any uncertain interest, not being copyhold, shall be surrendered, unless by deed or note in writing, signed by the party surrendering the same, or his agent lawfully authorized by writing, or by act or operation of law. Upon the construction of this statute

(Post, 218b. 2 version or remainder, wherein the estate for life, or years, may
 Rol. Abr. 494.) drowned by mutual agreement between them (B).

*338 a.
 The different
 kinds of sur-
 render.

(Post, 218b.)
 (9 Rep. 75.)
 2 Eliz. Dyer,
 176. 14 H. 7.
 3. 27 Ass. 27.
 49 E. 3. 2.
 11 H. 4. 2.
 12 H. 4. 21.
 13 H. 4. 13.
 14 H. 6. 15.
 17 H. 6. 17.
 21 H. 7. 6.
 40 E. 3. 24.
 31 Ass. 26.
 60 E. 3. 6.
 44 Ass. 3. 36.
 H. 8. Dyer,
 37. 8 Ass. 20.
 4 Mar. Dyer,
 14. 11 Eliz.
 Dyer, 280.

(553)*
 1. Surrender
 in deed.

* Note, there be three kind of surrenders, viz. a surrender properly taken at the common law, which is here before described, and whereof Littleton (sect. 636) speaketh (c). Secondly, a surrender by custom of lands holden by copy, or of customary estates, whereof you have read before, sect. 74, and a surrender improperly taken (as appears before, sect. 550) of a deed. And so of a surrender of a patent, and of a rent newly created, and of a fee-simple to the king.

A surrender properly taken is of two sorts, viz. a surrender in deed, or by express words, (whereof Littleton (sect. 636), *putteth an example) and a surrender in law wrought by consequent by operation of law.

Also there is a surrender without deed, whereof Littleton (sect. 636) putteth an example of an estate for life of lands, which may be

it has been held, that a lease for years cannot be surrendered by cancelling the indenture; because the intent of the statute was to take away the manner they formerly had of transferring interests in lands by signs, symbols, and words only; and therefore as livery of seisin on a parol feoffment was a sign of passing the freehold, before the statute, but is now taken away by the statute, so the cancelling of a lease was a sign of a surrender, before the statute, but is now taken away, unless there be a writing under the hand of the party. And the words, "by act and operation of law," are to be construed a surrender in law, by the taking a new lease, which being in writing, is of equal notoriety with a surrender in writing. *Magenis v. Maccullock*, Gilb. Rep. 236. *Roe, d. Earl of Berkeley v. Archbishop of York*, 6 East. 86. The Statute of Frauds, however, does not make a deed absolutely necessary to a surrender; but a note in writing will have the same effect. *Farmer v. Rogers*, 2 Wils. 27. *Smith v. Mapleback*, 1 T. R. 441. But it must be stamped according to the provisions of stat. 55 Geo. 3. c. 184.—[Ed.]

(B) To make a surrender good, the person who surrenders must be in possession; and the person to whom the surrender is made, must have a greater estate immediately in reversion or remainder, in which the estate surrendered may merge: but it is immaterial whether he has it in fee, or in tail, or for life. 2 Rol. Abr. 494. So a lessee for years may surrender to him, who has the reversion only for years, *Hughes v. Robotham*, Cro. Eliz. 302. Poph. 31. Bac. Abr. tit. Lease (S 2); though the lessee be for several years, and the reversioner has it only for one year, or a less term. *Per Popham and Fenner*, Cro. Eliz. 302. If a lessee demises part of his estate to the lessor, he may surrender the other part; for the reversion of that remains in the lessor. 2 Rol. Abr. 494. And if a lessee for thirty years demises for ten years, and both the lessees join in a surrender, it will be good; for it shall be construed the surrender of the lessee for thirty years first, and then of the lessee for ten years. Plowd. 541 a. So a surrender to an infant will be good; for his assent will be presumed till a disagreement appears. 2 Vent. 208. But a surrender to him who has not any reversion in him, is void; as if a lessee for years, to commence at Michaelmas, surrenders before Michaelmas, by deed, it is void; for till Michaelmas the lessor had not any reversion, in which it could merge. *Infra*, 338 a. And a surrender cannot be made, if the reversion or remainder be not immediate; as if lessee for thirty years leases to B. for ten years, B. cannot surrender to the first lessor, Plowd. 541 a: or if a statute be acknowledged to A. and another to B., and a fine levied by him in the reversion to A., his estate is not merged; for the meane interest of B. prevents the surrender or merger of his estate. Skin. 263. 6 Com. Dig. 315, 316. Surrender (F) and (G). So in the case of a tenant for life, with remainder to trustees during his life to preserve contingent remainders, the estate of the trustees is a vested estate of freehold, and will therefore prevent a surrender by him to the ulterior remainder-man. Ante, p. 138. n. (x). Et vid. *infra*, 338 a. n. (x).—[Ed.]

(c) See ante, p. 551. n. (A).—[Ed.]

surrendered without deed, and without livery of seisin ; because it is but a yielding, or a restoring of, the state again to him in the immediate reversion or remainder, which are always favoured in law. And there is also a surrender by deed ; and that is of things that lie in grant, whereof a particular estate cannot commence without deed, and by consequent the estate cannot be surrendered without deed.

Might be by parol (at common law) and livery of seisin not requisite. But a surrender of things in grant must be by deed.

But in the example that Littleton (sect. 636) putteth, the estate might commence without deed, and therefore might be surrendered without deed. And albeit a particular estate be made of lands by deed, yet may it be surrendered without deed, in respect of the nature and quality of the thing demised, because the particular estate might have been made without deed. And so, on the other side, if a man be tenant by the curtesy, or tenant in dower, of an advowson, rent, or other thing that lies in grant ; albeit there the estate begin without deed, yet, in respect of the nature and quality of the thing that lies in grant, it cannot be surrendered without deed. And so if a lease for life be made of lands, the remainder for life ; albeit the remainder for life began without deed, yet because remainders and reversions, though they be of lands, are things that lie in grant, they cannot be surrendered without deed. See in my Reports plentiful matter of surrenders.

(Añte, 225 b. Cro. Car. 369. 2 Rol. Abr. 493.)

Littleton (sect. 636) putteth his case of surrender of an estate in possession, for a right cannot be surrendered (d). *And it is to be noted, that a surrender in law (e) is in some cases of greater force

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Surrender must be of an actual estate,

(d) A surrender can only be made by a person who is in possession ; and therefore a tenant for life being disseised, or a lessee for years being ousted, cannot surrender to his lessor before entry, because he has but a right. 2 Rol. Abr. 494. Perk. sect. 599, 600. So, if a woman has a title to dower, and she surrenders to the person against whom she ought to have dower, it is a void surrender. Ibid. It is also observable, that regularly a tenant in fee (unless in the case of a surrender of a common, rent, &c. to the tenant, Perk. sect. 585.) cannot surrender his estate ; and therefore the very tenant could not make a surrender of a common, 2 Rol. Abr. 494 : though he were the very tenant of the king. Ibid. So the discontinuée of tenant in tail cannot surrender to the issue in tail. Ibid. Neither can a joint-tenant surrender to his companion. 2 Rol. Abr. 494. An estate at will also is not surrenderable, because it is at the will of both parties, and either party may determine his will without the formality of a surrender ; and therefore there is no surrender in law of an estate at will, between common persons. 12 Mod. 79. Lastly, to make a surrender good, privity of estate between the surrenderor and surrenderee is necessary. Thus it is said, in Plowden, that if a tenant for thirty years makes a lease for ten years, and the lessor and lessee join in a surrender to the person in reversion in fee, the surrender is good for both the estates ; and yet the lessee for ten years could not surrender by himself for want of privity ; but when the other joined with him, his surrender shall be taken in law to precede, and the surrender of the lessee for twenty years to follow, so that the same shall be good. Plowd. 541. 4 Cru. Dig. 160.—[Ed.]

(e) If a lessee for life, or years, takes a new lease of him in the reversion, this is a surrender in law of the first lease : as if lessee for his own life, or another's life, either in possession or in reversion, accepts a new lease for years, or a lessee for forty years takes a new lease for fifty years, in both these cases the first lease is surrendered. And this rule holds, although the second lease be for a less time than the first, as in the above instance of lessee for life, who accepts a lease for years ; and though the second lease be voidable. Infra, 218 b. So it is, although the second lease be made to the lessee and a stranger, or to the lessee and his wife. So, although the second lease be in another right, as if the husband having a lease for years in right of his wife, takes a new lease to himself in his own name, yet it amounts to a surrender in law of the first lease. Dyer, 178. So it is, although the first lease be to begin presently, and the second at a day to come, or *e converso* ; and though

and not of a mere right. 6 H. 7. 9. 37. H. 6. 17. 11. H. 7. 6. 14 H. 7. 4. Lib. 6. fol. 69. Sir Mo. Finche's case. 6 Rep. 11. 1 Leo. 323. 4 Rep. 53. (10 Rep. 67. 6 Rep. 69. Cro. Jac. 81. 1 H. 6. 1. Pl. Com. 341. 2 Rol. Abr. 491. Ante, 47 b. Dyer, 58.) 19 H. 6. 33. 27 Ass. 46. 14 H. 7. 4.

2. Surrender in law. Lease for years to begin at a future day is not merged by a surrender in deed, before the day; secus as to a surrender in law by acceptance of a new lease.

than a surrender in deed. As if a man make a lease for years to begin at Michaelmas next, this future interest cannot be surrendered, because there is no reversion wherein it may drown, but by a surrender in law it may be drowned. As if the lessee before Michaelmas take a new lease for years, either to begin presently, or at Michaelmas, this is a surrender in law of the former lease. *Fortior* & *aquior est dispositio legis quam hominis* (1).

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218 b.

On lessee's acceptance of a new lease no condition, by breach whereof it becomes void, yet the surrender in law of the old lease is absolute. Pl. Com. in Fulmerston's case, 107 b. (2 Rol. Abr. 494, 495, 497, 498, 499.) (5 Rep. 11 a. 1 Rol. Abr. 412.) So in case the lessee accepts a grant of the reversion on condition, &c.

Diversity herein when the lessee surrenders on condition.

7 E. 4. 29. 14 E. 4. 6. 45 E. 3.

*If a man make a lease for forty years, the lessee afterwards taketh a lease for twenty years, upon condition that if he doth such an act, that then the lease for twenty years shall be void, and after the lessee break the condition, by force whereof the second lease is void, notwithstanding the lease for forty years is surrendered, for the condition was annexed to the lease for twenty years, but the surrender was absolute. So it is, if a man make a lease for forty years, and the lessor grant the reversion to the lessee upon condition, and after the condition is broken, the term was absolutely surrendered. And the diversity is when the lessor grants the reversion to the lessee upon condition, and when the lessee grants or surrenders his estate to the lessor; for a condition annexed to a surrender may revest the particular estate, because the surrender is conditional. But when the lessor grants the reversion to the lessee upon condition, there the condition is annexed to the reversion, and the surrender absolute (F).

(1) For the first lease and the second cannot subsist together, and the parties, by making a contract of as high a nature for the same thing, tacitly consented to dissolve the former; for, without the dissolution of that, the

lessor could not grant to the lessee that interest which was already passed from the lessor to the lessee by the first lease. [Not to the 11th edition.]

there be a mesne estate between, as if land is let to A. for years, and afterwards is let to B. for years, to begin after the first term, and the assignee of A. takes a new lease. So if a man lets lands for ten years to one, and afterwards demises it for ten years to another, to begin at Michaelmas, and the first lessee accepts a new lease: In all these cases there is a surrender in law of the first leases. Shep. Touch. 301, 302. And if there be two lessees for life, or years, and one of them take a new lease for years, this is a surrender of his moiety. But if the lessee only license the lessor to make a feoffment, and to give livery of seisin for him; or to give livery of seisin for him as his attorney; or license him to enter into the land, and no more; neither of these things will amount to a surrender in law. So if the second lease be made of another, and not of the same thing whereof the first lease is made; as where the first lease is of the land; and the second is of a rent, or other profit to be taken out of the land; in these cases, there is no surrender of the first lease. Ibid. So if the second lease is not to begin until the first lease end, the taking of this second lease is no surrender of the first lease. And if the second lease be not a good lease, it will not be construed to be a surrender of the first lease; for there is no inconsistency in the acceptance of a new good lease being a surrender of the former, but the accepting a new void lease cannot show an intention to surrender the other, for a void contract for a thing that a man cannot enjoy, cannot, in common sense and reason, imply an agreement to give up a former contract. *Davison, d. Bromley v. Stanley*, 4 Burr. 2210. Et vid. *Doe, d. Earl Berkeley v. Archbishop of York*, 6 East. 86.—[Ed.]

(F) See acc. Dyer, 143. 2 Rol. Abr. 495. 3 Prest. Conv. 563. So it is, although the

A guardian in chivalry took a feoffment of the infant within age, that was in his ward, and the infant brought an assise, and the guardian shall be adjudged a disseisor, which proveth that the feoffment as against the infant was void, and yet by acceptance thereof the interest of the guardian was surrendered.

On guardian in chivalry taking a feoffment of the infant, though it be void, his interest is surrendered in law. 8 E. 2. Ass. 385. 50 E. 3. 27.

A man maketh a lease for term of life by deed, reserving the first seven years a rose, and if the lessee will hold the land after seven years, to pay a rent in money; the lessee will not hold over, but surrender his term: in this case in judgment of law he had but a term for seven years. And so it is if a man make a lease for life, and if the lessee within one year pay not twenty shillings, that he shall have but a *term for two years, if he pay not the money the estate for life is determined, and he shall have the land but for two years.

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A master of an hospital being a sole corporation, by the consent of his brethren makes a lease for years of part of the possessions of the hospital; afterwards the lessee for years is made master, the term is drowned (g); for a man cannot have a term for years in his own right, and a freehold in *auter droit* to consist together (as if a man lessee for years take a feme lessor to wife) (h).

338 b. On lease for years by a master of an hospital sole seized, &c., the lessee being afterwards made master, the term is merged.

(4 Leo. 37. Hob. 3.) Adjudged Mich. 16 & 17 Eliz. inter Turner & Gray def. in ejectionis firmis in Communi Banco. Rot. 946. Sir Francis Fleming's case. So in case of lessee for years marrying the feme lessor.

(a) But a man may have a freehold in his own right, and a term in *auter droit*: and therefore if a man lessor take the feme lessee to wife, the term is not drowned, but he is possessed of the term in

Secus where a man lessor marries the feme lessee; (a) 6 H. 4. 7. Pl. Com. 418.

second lease be voidable, as if it be made by tenant in tail; or as if a man makes a lease for years of land, and then makes a feoffment to another of the land, and takes back an estate to him and his wife of the land, and afterwards makes a new lease to the lessee for ten years; this is a surrender in law of the first lease: but if the second lease be merely void, then it is otherwise. Shep. Touch. 301. Supra, n. (x).—[Ed.]

(e) See ante, vol. 1. p. 192. n. (x), and infra, n. (l).—[Ed.]

(h) But this doctrine of Lord Coke, that a man cannot have a term for years in his own right, and a freehold in *auter droit*, to consist together, has been denied to be law. *Litchden v. Winsmore*, 1 Rol. Abr. 934. And see *Platt v. Sleap*, Cro. Jac. 276. 1 Bulstr. 118. Godb. 2; in which case the husband had a term in his own right, and the freehold in right of his wife by descent, and yet it was held that these estates might consist together. After a review of the cases on this branch of the law of merger, Mr. Preston, (3 Conv. 285, 286.), observes, that the distinction really established by them is not generally, that there will not be any merger, because the two estates are held in different rights, or because the freehold is held by the owner of the term in his own right, and the term in *autre droit*. It is only that the accession of one estate to another, merely by the *act of law*, as by marriage, by descent, by executorship, intestacy, &c. will not occasion a merger of one estate in the other, when the two estates are held in different rights. While a descent of the inheritance will merge a term, which a person has in his own right, though he be a trustee of that term. *Lee's case*, 3 Leon. 110. Plowd. 418. 4 Leon. 37. And though there will not be any merger, where either of the two estates, which are held in different rights, is an accession to the other by the *act of law*, yet, it is observable, that the lesser estate will merge as often as one of them is an accession to the other, *by the act of the party*. 3 Prest. Conv. 309, 310. Therefore, if a husband possessed in right of his wife, *purchases* the reversion or remainder: or if an executor has a term in right of his testator, and *purchases* the reversion; in both these instances the term will merge. 4 Leon. 38. Bro. Surr. 52.—[Ed.]

(b) 22 H. 8.
Br. Surren-
der, 52.
(2 Cro. 275.
Mo. 54.)

her right during the coverture (1) (b). So *if the lessee make the lessor his executor, the term is not drowned. *Causâ quâ supra* (K).

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or where the lessee makes the lessor his executor;

(1) If a husband who is tenant for years intermarries with a woman who at that time has the reversion, or to whom the reversion descends after the intermarriage, the term will not merge, because in one case the right of the husband in the reversion of his wife, and in the other case the descent, is an act of law. But if a husband, tenant for years in right of his wife, purchase the immediate reversion, the term will be annihilated; for the purchase was the express act of the husband, and amounts to a disposition of the term. And if a feme, who has a term for years as executrix, intermarry with a person who after the intermarriage becomes entitled by purchase to the immediate reversion; or if a person, who has a term as executor, do himself purchase the immediate reversion; the term will, in either case, be merged. 3 Prest. Conv. 304, 305.

When the husband has an estate of freehold in his own right, and the fee in right of his wife, the freehold will not merge; and therefore where a woman seised of land in fee, leased the same to a stranger for life, and took a husband, and the lessee granted his estate to the husband, this was no surrender; and yet the husband was seised of the reversion in fee, which was immediate unto the estate of the lessee, viz. in right of his wife, and not in his own right. And it seems to be a general rule, that the freehold of the wife will not in any case merge in the freehold of the husband; for the wife cannot part with her freehold without some act of record. 3 Prest. Conv. 305, 306. *Stephens v. Bretridge*, 1 Lev. 36. Perk. sect. 612—622.—[Ed.]

(K) It may be proper in this place to take a concise view of some of the leading heads of the doctrine of merger, a subject which is intimately connected with the law of surrender. Merger is described, to be whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate; whereby the less is immediately annihilated, or is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. Shep. Touch. 341. ed. Hillyard. 2 Bl. Com. 177. The object of merger is to accelerate the possession, or at least the estate in which the merger takes place. 3 Prest. Conv. 6. It is an act of law; and seems entitled to the denomination of the extinguishment by act of law of one estate in another by the union of these two estates. To consolidate two estates, and to confound them into one estate, is its effect. The estate thus blended will give the precise time of enjoyment, originally limited by the more remote of the two estates, and no more; for the estate in which the merger takes place is not enlarged by the accession of the preceding estate. Ib. Et vid. *Smith v. Lord Camelford*, 2 Ves. jun. 714. *Webb v. Russell*, 3 T. R. 394. Brooke. Exting. pl. 50. Saund. 387. Salk. 326. The circumstances which must concur in order to accomplish the operation of the law of merger, are thus enumerated by Mr. Preston, in his very valuable and masterly treatise on this subject.

1st. Two or more estates must meet in the same person, in the same lands, &c. or in the same part of the same lands, &c. A mere right or title will not suffice. *Pawling and Hardy*, Skin. 3. 62. Com. Dig. Surre. 3 Prest. Conv. 50. For instances in which the question may arise, whether the party has one estate, or several estates, see *Rosse's case*, 5 Co. 13. *Rosse v. Atwood*, Cro. Eliz. 401. *Rosse v. Ardwick*, Goldb. 187. Moor. 398. 15 Vin. 366. S. C. *Bowles v. Poor*, Cro. Jac. 282. See also ante 182 b. vol. 1. p. 744. n. (N); vol. 2. p. 144. n. (P). *Mandeville's case*, ante, 26 b. vol. 1. p. 544. 3 Prest. Conv. 58—85. That the determination or acquisition of a third or intermediate estate may be the cause of merger, as between estates kept distinct by means of the intermediate estate, see *Bates's case*, 1 Salk. 254. Ld. Raym. 326. *Duncomb and Duncomb*, 2 Lev. 437. 3 Prest. Conv. 85—87. 143. Infra, n. (o); and that by the descent of a portion of the ultimate remainder in fee, a particular estate in that portion may be merged; see *Crump*, d. *Woolley v. Norwood*, 7 Taunt. 362.

2d. The more remote estate must be the next vested estate in remainder or reversion, without any intervening vested estate; and also without any intervening interest by way of contingent remainder, created in the same instant of time, or by the same act which gives origin to the other estates. See Bro. Lease, 63. *Duncomb v. Duncomb*, 3 Lev. 437. *Bates's case*, 1 Salk. 254. 4 Leon. 9. 33 Eliz. Brooke, Exting. 54. *Whitchurch and Whitchurch*, 2 P. Wms. 286. *Scott and Fenhoulet*, 1 Bro. C. C. 69. But although a con-

tingent remainder depending on the former of two estates vested in the same person, will suspend the absolute union of these estates, if created by the same conveyance; yet this protection from merger will continue only till the owner of these estates has done some act, by which he confounds the first of his estates in the more remote estate, and by that means destroys the contingent remainder. *Per Hale, Purefoy v. Rogers*, 2 Saund. 380. And even while the intervening remainder is in contingency, the several estates belonging to the same person will unite for all the purposes of tenure, and there will be a temporary merger, subject to the right of those entitled under the contingent remainder, to have the benefit of that remainder, when it can vest. In this instance, the estate opens and closes as the circumstances of the contingent remainder require. *Lewis Bowles's case*, 11 Co. 79. 3 Prest. Conv. 112, 113. And, notwithstanding an intervening estate for years, the freehold may unite with the inheritance, when the freehold and the inheritance meet in the same person, so as to confer a title by curtesy, dower, *possessio fratris*, &c. without prejudice to the term: which affords an instance of a qualified merger, or, more accurately speaking, of union and consolidation, without producing all the effects of merger. *Bates's case*, 1 Salk. 254. 3 Prest. Conv. 114, 115. And an intervening estate for years will prevent the merger of another estate for years, in the freehold or inheritance, limited to take place after the several estates for years. *Ib.* 127. *Bicknal v. Tucker*, 15 Vin. 362. pl. 2. Brownl. 181. An *interesse termini*, however, is not such an intervening interest as will prevent the application of the law on merger. On the contrary, notwithstanding an *interesse termini*, two estates which in all other respects are immediate to each other will unite, and the right of possession under the *interesse termini* may, unless circumstances impede, be accelerated. 3 Prest. Conv. 120, 121. *Northam's case*, Heil. 55. That the merger of one of three or more estates may be interrupted by reason of a mesne estate, which cannot merge, because it is larger than the more remote estate; see 3 Prest. Conv. 141, 142.

3dly. The estate in reversion or remainder must be as large as, or larger than the preceding estate. Ante, 54 b. vol. 1. p. 635. Bro. Abr. Extng. 11 H. 4. 34. 3 Leon. 157, 158. Jenk. Cent. 248. pl. 37. *Mordant v. Watt*, Brownl. 19. Thus an estate at will will be merged by the acquisition of an estate for years. 3 Prest. Conv. 176. So estates by extent on statutes, &c. may merge in each other (*Dighton v. Grenville*, 2 Vent. 231. *Collis's Par. Cas.* 64. Vin. Abr. Merger.), and in estates for years, &c. 3 Prest. Conv. 177. So, we have seen, estates for years may merge in each other, ante, p. 510. n. (q 3); or in estates of freehold or inheritance. Ante, vol. 1. p. 635. n. (i). So estates after possibility of issue extinct are, for all the purposes of merger, estates for life, and may merge in estates of that or a superior degree. Ante, vol. 1. p. 555. n. (e). So estates for life may merge in each other, or in larger estates. Ante, vol. 1. p. 624. n. (e). And through an estate tail, while in the tenancy of the tenant in tail, and descendible to the issue inheritable under the entail, is privileged from merger, yet when the right of the issue under the entail ceases, or is defeated, or suspended, this estate may merge in the fee-simple. Ante, vol. 1. p. 549. n. (p). So determinable fees, qualified fees, and conditional fees, will merge in the fee-simple, or in any fee of the same or larger extent, that is, in any fee not being in fee-tail. 3 Prest. Conv. 258. And it seems probable that, when the base or determinable fee depends in point of title on an estate tail, it will merge in the immediate reversion or remainder, whether the same is held for an estate in fee, or in fee-tail. *Ib.* 259. And although a person cannot have a power and a fee in the same lands, when he is seised of that fee under a gift or conveyance to him by the rules of the common law, but the power will merge in the estate, *Goodill v. Brigham*, 1 Bos. & P. 192; yet it is clearly settled, that, in a conveyance to uses, the same person may have a power of appointment and also a fee. *Sir Edward Clerc's case*, 6 Co. 17. *Maunderell v. Maunderell*, 10 Ves. 244. As if a conveyance is made by A. to B. in fee, to such uses as A. shall appoint, and in default of appointment to the use of A. in fee, A. is seised by means of the statute of Uses, and the power and the fee are consistent. So if A. convey to B. in fee, to such uses as A. shall appoint, and in default of appointment to the use of A. for life, remainder to B. in fee. The power, being in a conveyance to uses, is good. But it is otherwise in the case of a conveyance to A. in fee, to such uses as A. shall appoint, and in default of appointment to the use of A. in fee; for the statute of Uses is applicable only when there is an use divided from the legal ownership; and therefore the statute does not execute uses of this description, when the use or beneficial ownership is in effect embraced in, and conferred by the legal estate. 3 Prest. Conv. 270—273.

4thly. The several estates must be held in the same legal right; or when the estates are held in different legal rights, one of them must not be an accession to the other, merely by act of law. See ante, n. (π) and (i), p. 556. and (L) infra. The exemption from merger in favour of estates held in *autre droit*, appears to apply, 1st. As between husband and wife.

2d. As between executors and administrators, having an estate in their own right, and another in right of their testator or intestate. 3d. As between persons who form a part of a corporation aggregate of many, and who have estates in their individual capacity, at the same time that the corporation, of which they are a constituent part, has an estate in its corporate capacity. 4th. Between persons entitled under an entail, and who have the fee expectant upon that estate. And 5th. Between persons who have an instantaneous or temporary seisin to serve uses, to be raised out of the estate conveyed to them, and also an estate in their own right. This exemption from merger, however, does not hold, as between trustees and *cestuis que trust*, *Lee's case*, 2 Leon. 110. 3 Leon. 6. *Villiers v. Villiers*, 2 Atk. 72; but the doctrine of merger equally applies, whether the estate charged with the trust merges in the estate which the trustee had in his own right; or the estate of the trustee held in his own right, becomes merged in an estate conveyed to him, or devolving on him by descent. But in either case equity will afford relief. Though a trust will not prevent the merger of one of two legal estates, yet when the same person has the trust or beneficial ownership, and also the legal estate, though they are derived under distinct titles, the trust will merge in the legal ownership. *Cooke v. Cooke*, 2 Atk. 67. *Willoughby v. Willoughby*, 1 T. R. 766. *Goodright v. Sales*, 2 Wils. 331. *Villiers v. Villiers*, supra, *Capel v. Girdler*, 9 Ves. 509. For it is a general rule in equity, that a person cannot be a trustee for himself, and that as between real and personal representatives, or between different classes of heirs, or heirs in different lines, there is not any equity, but the legal right must prevail. 3 Ves. jun. 126. *Ibid.* 339. Therefore, except in the case of infants, &c. an equitable charge will merge in the legal ownership when they are united; an equitable term will, as between the heirs and executors, merge in the legal estate of inheritance; and an equitable fee, by descent *ex parte paterna*, will merge in the legal fee taken by descent *ex parte materna*: so as, in the two former cases, to exclude the person entitled to the charge; and, in the latter case, to exclude the paternal heirs in favour of the maternal heirs. *Doe, d. Baker v. Putt*, cited Dougl. 772. *Goodright v. Wells*, Dougl. 771. 3 Ves. jun. 339. 3 Prest. Conv. 328. But when a person has a fee subject to an executory devise to his mother, and the interest under the executory devise descends to him, and the event happens on which the executory devise is to operate, the descent from the mother will govern the title; and consequently the interest by executory devise is not extinguished in the fee. *Goodright v. Searle*, 2 Wils. 29. Also an exemption from merger is not allowed, as between joint-tenants, when the reversion comes to one of them by descent. *Wiscot's case*, 2 Co. 60: nor when the reversion is limited by any other deed, &c. than that which creates the joint-tenancy. Ante, 184 a. vol. 1. p. 746. And it is doubtful whether it applies as between persons who have a term in their own right, and also the *parsonage* in right of their church and in their capacity of persons: or between prebendaries who have an estate in the revenues and lands of the prebend under a grant from the prebendary, and also the advowson of the prebend as their inheritance, or the incumbency of the prebend in the character of prebendary. Vin. Abr. tit. Merger. 3 Prest. Conv. 298—300.

5thly. The estate must not be privileged, either under the statute of Uses, or the statute of Entails. It has been already shown, that the exemption of estates tail from merger is for the benefit of the issue; and it may be considered as a general rule, that when there is not any longer a possibility that the issue in tail can claim a right to inherit the estate in that character, and *per formam doni*, the estate tail ceases to retain the quality of being privileged from merger. Ante, vol. 1. p. 549. n. (r). With respect to the privilege from merger under the statute of Uses, Mr. Preston observes, that all the cases which have arisen on this statute, as well as the words of the statute itself, prove that there is an exemption from merger under this statute, in those instances only in which the owner of the term, or particular estate, is the instrument mediately or immediately for raising the uses, so that the uses are to arise out of the estate conveyed to him. For even at this day an estate arising to a feoffee to uses under a declaration of uses, will merge an estate previously vested in such feoffee to uses. Also when a man has a term, or other particular estate, in his own right, and the reversion or remainder is conveyed to him upon trusts which do not execute into estate by force of the statute of Uses, the legal right under the term or other particular estate will be extinguished. So when a termor joins with those who have the reversion in making a conveyance to a third person, either to uses or upon trust, and although there be an express declaration that the conveyance shall not affect the right of the termor, yet his estate will be annihilated. And the only mode of keeping his estate on foot, is to insert an express declaration of use, by way of confirmation in his favour. And then there is rather a new term under a new title, than the old term under the ancient title. 3 Prest. Conv. 369, 370. *Ferrers v. Fermor*, Cro. Jac. 643. *Fountain v. Cook*, 1 Mod. 107.

6thly. The doctrine will not have effect, to alter the quality of one of two estates, in the same person, or to destroy a contingent remainder, when the several estates are limited by the same deed or instrument, or take their effect in the same instant of time, and, in some degree, by the same act, and some other person is concerned in the consequence of the merger. With respect to this branch, see ante, 182 b. vol. 1. p. 744 and 184 a. vol. 1. p. 746. and the notes there. Ante, p. 144. n. (P). Supra, p. 557. *Rogers v. Downes*, 2 Mod. 293. *Purefoy v. Rogers*, 2 Saund. 386. 3 Prest. Conv. 376—403.

7thly. The doctrine does not apply to an estate for several lives, arising under the same limitation, as giving one undivided and entire time of continuance. In *Ross's case*, 5 Co. 14. it was determined that a lease for several lives was one entire estate, and not several and distinct estates; and consequently that there could not be any merger, since there were not two estates, so that one might merge in another. Et vid. *Uttly Dale's case*, Cro. Eliz. 182. But when a lease is made for several lives, as distinct periods of time, giving one estate in possession, and others in remainder, then *cateris paribus*, the doctrine of merger will apply; because there are several estates: that doctrine however cannot operate, unless the estate in remainder is larger than, or as large as, the estate in possession. 3 Prest. Conv. 406. Supra, p. 558.

And 8thly. The union of two estates in the same person, by means of the joint act of the respective owners of these estates, with an intention that the estate of their assignee should continue for the collective time of their several estates, will not be a cause of merger. 3 Prest. Conv. 50, 51. On this head Mr. Preston observes, that all the cases in which the doctrine of merger has prevailed, are authorities only that one estate will be annihilated, when there are two distinct estates, and the time of one becomes, either in point of fact, or in intendment of law, inconsistent with the other; or there is an evident intention to change the tenancy under one estate, to a tenancy under another estate. But when one person accepts a conveyance from two persons who have distinct estates, becoming the purchaser of the estate of each of them, and their estates give particular interests only, and not the complete ownership and absolute dominion over the property, either generally, or subject to certain particular estates, it is a natural and reasonable inference that he intended to have the right of enjoyment for the several periods of time comprised in these estates. To many purposes there is a union and consolidation of the two estates. They become one entire interest, so as to perfect a right of dower, tenancy by curtesy, &c. and give the remedies proper to the estate considered as an estate of inheritance in possession: still, however, there is not any merger. For to merger it is essential that the time of one estate should, in point of title, be absorbed and lost in the time of the other estate; while, in the case under consideration, the right of enjoyment will continue for the several times of the several estates. Another circumstance peculiar to these cases, and distinguishing them from those to which the doctrine of merger is applicable, is, that the right of enjoyment continues under each estate for the time of that estate; so that under these circumstances the charges on the *reversionary* or *more remote* estate, which were created by the former owner of that estate, will not be accelerated by the union and consolidation of the two estates. lb. 409, 410. Et vid. *Bredon's case*, 1 Co. 77. *Treport's case*, 6 Co. 14. *The Earl of Clanrickarde's case*, Hob. 273. *Beckwith's case*, 2 Co. 56. But when one and the same person has several estates, which are kept distinct in him by reason that one of the estates is privileged from merger under the statute of Intails, or for the sake of some other person concerned in benefit under a joint-tenancy or a contingent remainder, there will be a merger when this person conveys these several estates even by one conveyance and one entire grant. For as these estates were kept distinct and exempted from merger for a particular cause, a merger will take place on the union of these estates in another person, or even in the same person as taking under a conveyance to uses; since the cause for the exemption from merger no longer exists, *et cessante causa cessat effectus*. 3 Prest. Conv. 441. *Symonds v. Cudmore*, 4 Mod. 1. *Eustace's case*, Jones, 55. 2 Salk. 204.

As to the effect of merger, it is observable, 1st, That the doctrine of merger may be injurious to the person in whose estate in reversion or remainder a prior estate becomes merged. We have seen, that when he is a trustee, he will be protected by the court of equity from the consequences of the merger; but unless he can derive a protection from this or some other source, he may, by reason of the merger, be subjected to a lease operating by *interesse termini*, to a charge, or to a judgment, as a present and immediate incumbrance, affecting the possession: while, without the merger, such lease, judgment, &c. would not have been attached on the possession, until the prior estate had determined by effluxion of time. 2dly. Notwithstanding the merger of the particular estate, persons who have interests affecting the estate which is merged, will be left in the same condition in point of benefit, as if no merger had taken place. Therefore, if tenant for life has made a lease, or granted a

rent-charge, or confessed a judgment, such lease, rent, or judgment, will remain in force, and affect the land during the period of the estate which is merged, in like manner, as if that estate had continuance. For the purpose of these estates, the particular estate, though merged, has continuance in point of title, although it is merged in point of law. *Infra*, 338 b. 3 Prest. Conv. 446—448. Under the same principle, the right of exercising powers of leasing and of cutting timber, cannot be accelerated to the prejudice of persons who have opposing interests. *Ibid.* 452. 3dly. The effect of the merger on the estate in which the merger takes place, is to subject the reversion or remainder, thus accelerated, to all those burdens and consequences, which would have attached on that estate in case the prior estate had not existed, and in the same order or series of time, as if that estate were determined. *Symonds v. Cudmore*, 4 Mod. 1 Perk. sect. 62, 63. *Shelbourne v. Biddulph*, 4 Bro. P. C. 594. *Infra*, 338 b. Post, 132 b. Thus the possession will be chargeable during the period appointed for the continuation of the particular estate, with all the incumbrances which affected that estate; and also (by way of acceleration) with the incumbrances which attached on the reversion or remainder as thus accelerated. *Errington v. Errington*, 2 Bulstr. 42.

It only remains to observe, that an executory interest by devise or by bequest, or an executory interest under a springing or shifting use, will not cease by the union of the executory interest in the person who has the estate, which is subject to that interest. *Goodright v. Searle*, 2 Wils. 29. *Goodtitle v. White*, 15 East, 174. 3 Prest. Conv. 493. But although these interests are distinct, while they are in the original owner, yet after he has aliened the fee, the two interests will be united; for the conveyance will operate first, as a transfer of the estate, and secondly, as a release, by way of extinguishment of the interest under the executory devise, &c. *Ibid.* 407. With respect to persons who are releasees to uses, we have seen, that no estate will be merged, by reason that the owner thereof accepts another estate merely as a releasee or grantee to uses. *Supra*, p. 559. On the other hand, an estate which such feoffee, releasee, or grantee may take under an use declared of his estate, may be the cause of merger; in the same manner, as if the person taking an estate under the use had not been the feoffee, releasee, or grantee to uses. It is also to be remembered, that this protection is extended to a person who is an instrument towards the raising of uses, although he be not the feoffee, releasee, or grantee, on whose immediate seisin the uses arise. Thus, in the instance of a conveyance to a man, and his heirs, to the intent that he may be tenant of the freehold, to the end that a common recovery may be suffered to uses, although the uses arise from the seisin of the demandant, and not from the seisin of the tenant, yet the estate which was in the tenant prior to the acceptance of the conveyance, will be protected. *Ferrers and Curson v. Ferrer*, Cro. Jac. 643. 3 Prest. Conv. 512, 513. Merger is not favoured in equity, except to promote the intention, *Phillips v. Phillips*, 1 P. Wms. 41; and therefore though there may, as to equitable estates, be an union in equity, as well as at law, yet equity would not permit an acceleration of charges, incumbrances, &c. as a consequence of the union, against the justice of the case, or contrary to the intention. But even in equity, if a man grant a lease of the possession, while he has merely a reversion or remainder expectant on a prior estate, yet on his purchase of the particular estate, equity proceeding upon those rules which govern that court in enforcing specific performance of contracts, would decree a lease to operate on the ownership thus acquired, subsequent to the lease; so as to charge the possession with the lease. 3 Prest. Conv. 558. As to money paid, the union of the title to the money in the person who is owner of it, whether it be real or personal property, will extinguish the demand. The fund must be taken as it is found. *Pulteney v. Darlington*, 1 Bro. C. C. 223. 2 Ves. jun. 175. With respect to creditors, it is observable, that after the merger of a term belonging an executor or administrator in that character, in the reversion or remainder which the executor or administrator, or the husband of an executrix or administratrix, has in his own right, the term, it should seem, no longer remains assets, against which an execution can be sued as part of the goods of the testator. In consequence of annihilating the term by his own act, the value of the term is assets in the hands of the husband, or executor, &c. making the husband in his life-time, and his wife after his decease, liable to that extent, as for value received; or for a *devastavit*. But at law, the term does not, it is apprehended, continue specifically liable to the demands of the creditors, merely as creditors. *Chalton and others v. Low and others*, 2 P. Wms. 328. But it is probable, that a court of equity would not suffer creditors to be defrauded by the merger of the term; but would follow the inheritance while it remained with the executor, &c. or with the wife, or the husband; so as to give the creditors out of the inheritance a compensation to the value of the term, as assets belonging to them in equity, though withdrawn from them by the rules of law. 3 Prest. Conv. 559—565. With respect to persons who have legal and equitable estates united, as a legal estate cannot merge in an equitable

But if it had been a corporation aggregate of many, the making (563) of the lessee master had not extinguished the term, no more than if the lessee had been made one of the brethren of the hospital (L). or in case of leasee for years under a corporation aggregate of many, being made master.

one, it frequently becomes material, with reference to the application of the doctrine now under consideration, to consider whether the term be not legal, and the inheritance equitable, or *e converso*. We have seen that an equitable fee may be extinguished by the legal fee, and that the purchase of the legal fee will govern the order of succession. In general too, all equitable interests will be absorbed in, and extinguished by the legal interests, as far as they are united, since the legal estate will govern the title, as far as the same person has the legal estate, and the benefit of that estate, as the equitable owner. *Wade v. Paget*, 1 Bro. C. C. 363. But the legal estate will not extinguish more of the equitable interest, than is corresponding to, and co-extensive with, the legal estate. 3 Prest. Conv. 567. And where a charge upon land comes to the same person, that is entitled to the land (*Clerk v. Rutland*, Lane, 111. *Chester v. Willes*, Ambl. 246), if he has not the same interest in both, there shall be no extinguishment upon his account. *Price v. Seys*, Barn. C. C. 120: in which respect there is a distinction between legal and equitable estates, on the one hand, and freehold and copyhold interests on the other hand; because the fee of a copyhold may be extinguished in a particular estate of the freehold tenure. *St. Paul v. Lord Dudley and Ward*, 15 Ves. 167. So if a person has a charge on the inheritance, and purchases an estate, being a portion of that inheritance, the charge will not be extinguished or suspended, except so far as it affect the ownership, which the party acquires in such portion of the inheritance. 3 Prest. Conv. 567. The general rule also is, that if a person has a portion charged on the inheritance, and then acquires the inheritance in fee by purchase, the charge cannot be enforced by the personal representatives to the prejudice of the heirs or real representatives. *Chester v. Willes*, Ambl. 246. Supra, p. 559. But if there be evidence of the intention of the owner of the fee, that the charge should not merge; or where no intention is expressed, or the party is incapable of expressing any, if it appear to the court to be most advantageous for him, that it should continue personal property; in such case the charge will not sink. *Thomas v. Kemish*, 2 Vern. 343. Et vid. *Forbes v. Moffatt*, 18 Ves. 384; in which case a mortgage was held to be not merged by union with the fee; the actual intention, not established by the acts of the party, being presumed from the greater advantage against merger in favour of the personal representative. So it is when the inheritance descends on an infant entitled to a portion, or when an estate-tail or for life only is acquired. (*Chandos v. Talbot*, 2 P. Wms. 610. Ambl. 246.), or creditors would be prejudiced. *Donisthorpe v. Porter*, Ambl. 600. 1 Sand. 242. There are also some other exceptions to the general rule that the succession shall be governed by the legal and not by the equitable estate; for if a person has a term of years at law, and purchases the equitable inheritance, the term will become attendant on the inheritance, for the benefit of the heirs, in exclusion of the executors, or, more correctly speaking, the executors, as to the legal estate, will become trustees for the heirs. *Charlton v. Low*, 3 P. Wms. 328. Also, when a copyholder of the legal estate purchases the equitable fee of the freehold tenure, the heirs of the freehold tenure, though merely equitable, will be entitled to the benefit of the legal estate of the copyhold tenure. 3 Prest. Conv. 569. The general rule, however, is, that if a man has the same interest, and absolute dominion and property in the whole inheritance, as he has in the term or power for raising money out of the inheritance, there it must merge, for a man cannot have a power to raise money merely for my benefit out of that which is mine. But if there be any difference in the two interests, or any other person intermediate, then there can be no merger; for if there be any merger in the first case, it will change the intent of the conveyance; and in the other case, there being an intermediate estate, there is no merger at law, no more is there in a court of equity in the case of a trust. 2 Fonbl. Tr. Eq. 167. Et vid. *Willoughby v. Willoughby*, 1 T. R. 766. But though a term will not become attendant on the inheritance, by the construction of a court of equity, except under the circumstances stated in the general rule, yet it may, under other circumstances, become attendant, by the express declaration of the owner of the term, and of the inheritance. *Scott v. Fenhoulet*, 1 Bro. C. C. 69. 3 Prest. Conv. 570.

The whole doctrine of merger is unfolded with great perspicuity and learning, by Mr. Preston, in the 3d vol. of his Treatise on Conveyancing, from which the preceding observations have been chiefly extracted: to that work we beg to refer the student for a full development of this interesting subject.—[Ed.]

(L) With respect to persons who are seised as individuals of one estate, and of another

338 b.
3. Effect of a
surrender.
On a surren-
der, the es-
tate, as be-
tween the
parties, is ab-
solutely de-
termined;
21 H. 6. 53.
(Ante, 185.
8 Rep. 146.)
(564)*
secus as to
strangers;
45 E. 3. 13.
5 H. 6. 9.
9 E. 4. 18.

But herein are two diversities worthy of observation. The first is, that having regard to the parties to the surrender, the estate is absolutely drowned, as in Littleton's case (sect. 636), between the lessee and the second baron (M). But having *regard to strangers, who were not parties or privities thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance (1) (N). As if a reversion be granted with warranty, and tenant for life surrender, the grantee shall not have execution in value against the grantor, who is a stranger during the life of tenant for life; for this surrender shall work no prejudice to the grantor who is a stranger.

40 E. 3. 13.
9 E. 4. 18.
1 H. 6. 1.
24 E. 3. 77.

So if tenant for life surrender to him in reversion, being within age, he shall not have his age; for that should be a prejudice to a stranger, who is to be demandant in a real action.

as part of an aggregate corporation, as against such persons, it is clear that there cannot be any merger, either of the estate held in right of their corporation, or of the estate held in their own right. For in point of law they are not entitled to the two-estates: in the estate held in right of the corporation, they have no interest or estate individually. 3 Prest. Conv. 311, 312.

With regard to the case of the lessee under a hospital becoming master of the hospital, or the similar case of a person who is lessee under the parson of a living, with the concurrence of patron and ordinary, and who afterwards, during the term, becomes parson of the church, Mr. Preston observes, that these cases only prove, that in those particular instances the term did merge, notwithstanding the term and the freehold were held in different rights; and they by no means establish a general rule, that a term in a man's own right is inconsistent with a freehold in *autre droit*. Though these positions may be law, they do not contravene the doctrine stated in the last note but two, since the party clearly had the term in his own right, and afterwards acquired the freehold in his corporate capacity. Ib. 283.—[Ed.]

(M) With respect to the effect of a surrender, it is observable, that on a surrender, the whole estate is determined without other ceremony; and as to the parties themselves, it will be absolutely determined. And therefore, in the case put by Littleton, if a husband, seised in right of his wife, leases for the life of B., which is a discontinuance, and afterwards B. surrenders his estate to the husband, the discontinuance is determined. *Infra*, 338 b. p. 565. And if A. mortgages his reversion in fee to the lessee for years, whereby his term is surrendered, and afterwards pays the money pursuant to the condition, yet his term will be extinguished, and not revive. 3 Leo. 6. So by a surrender the estate will be absolutely merged for the benefit of a stranger. *Infra*, 338 b. And by a surrender the estate will be merged, though it be to the disadvantage of him who assents; as in the case to be presently proposed, of attornment by the lessee for life to a release by the reversioner, to a person to whom he had previously granted the reversion for life, in which case the lessee becomes punishable for waste, where he was dispensable upon the grant of the reversion for life. *Infra*, 338 b. But the estates shall have continuance notwithstanding a surrender, to avoid a prejudice to a stranger. *Infra*, 338 b. It is also observable, that a charge made before the surrender revives, if the surrender be avoided against him who claims paramount the surrender; as if lessee for life grants a rent-charge, and afterwards enfeoffs the grantee, and the lessor enters for the forfeiture, the rent revives; for the lessor claims paramount the feoffment. *Infra*, 338 b. So if a grantee for life of a rent accepts a lease of the land from him in the reversion, and afterwards the lease is surrendered, the rent revives. *Peto v. Pemberton*, Cro. Car. 101. 6 Com. Dig. 320, 321. Surrender (L. 1. 2. 3.) (M). See further as to the effect of a surrender, Shep. Touch. 308, 309. Vin. Abr. Surrender.—[Ed.]

(1) On the surrender of terms of years by one termor for years to another termor for years, see *Hughes v. Robotham*, 1 Cro. 302.—[Butler.]

(N) See ante, n. (A) p. 551; and ante, n. (N) p. 561.—[Ed.]

If tenant for life grant a rent-charge, and after surrender, yet the rent remaineth, for to that purpose he cometh in under the charge. *Causâ quâ supra* (o).

5 H. 5. 8.
26 Ass. 38.
7 H. 6 b.
6 Rep. 79.
7 Rep. 38.
Ante, 184 b.)

If a bishop be seised of a rent-charge in fee, the tenant of the land infeoff the bishop and his successors, the lord enter *for the mortmain, he shall hold it discharged of the rent; for the entry for the mortmain affirmeth the alienation in mortmain, and the lord claimeth under his estate; but if tenant for life grant a rent in fee, and after infeoff the grantee, and the lessor enter for the forfeiture, the rent is revived, for the lessor doth claim above the feoffment (p). But if I grant the reversion of my tenant for life to another for term of his life, and tenant for life attorn, now is the waste of tenant for life punishable (q). Afterwards I release to the grantee for life and his heirs, or grant the reversion to him and his heirs; now albeit the tenant for life be a stranger to it, yet because he attorned to the grantee for life, the estate for life which the grantee had shall have no continuance in the eye of the law as to him; but he shall be punished for waste done afterwards.

(565)*

(Ante, 234.)
48 E. 3. 16.
(Mo. 94.)

The second diversity is, that for the benefit of an estranger the estate for life is absolutely determined. As if he in the reversion make a lease for years, or grant a rent-charge, &c. and then the lessee for life surrender, the lease or rent shall commence *maintenant*. So in the case of Littleton; first, between the lessee and the second husband, the state for life is determined; and secondly, for the benefit of the issue it shall be so adjudged in law. Here note a diversity, when it is to the prejudice of a stranger, and when it is for his benefit.

unless it be
for their ad-
vantage.
(Pl. Com. 198.)

If a man make a lease to A. for life, reserving a rent of forty shillings to him and his heirs, the remainder to B. for life, the lessor grant the reversion in fee to B., A. attorn, B. shall not have the rent;

(o) It is a principle of law, that *quod meum est sine facto, sive defectu meo, amitti vel in alienum transferri non potest*: and a consequence of this principle, is, that, notwithstanding the merger or surrender of any estate belonging to a particular tenant, the charges created by that tenant will continue; and the rents and conditions annexed to the reversion, as the estate which becomes merged, will cease to exist. *Lord T. v. Barton*, Moor. 94. *Webb v. Russell*, 3 T. R. 402. *Infra*, n. (a). But the policy of the law establishes a relation between the owner of a derivative estate, and the person who, after the merger, has the next estate in remainder or reversion. Therefore, after the merger, the under-lessee may surrender to the person who has the next estate, *Shep. Touch. Chap. Surrender*; or the lessee may be punished for waste, at the suit of the owner of that remainder or reversion. And although prior to the merger of the estate of the lessor, there could not, on account of the mesne interest, have been any merger of the derivative estate, in the estate in which the merger of this reversion has taken place, yet, after the merger of this reversion, the derivative estate may, on its union with the next estate in remainder or reversion, become merged in that remainder or reversion. *Archer's case*, 1 Co. 67. *Bredon's case*, 1 Co. 76. *Treport's case*, 6 Co. 14. *Webb v. Russell*, 3 T. 3. 402. 3 Prest. Conv. 556, 557.—[*Ed.*]

(p) In the former case the lord shall hold the land discharged of the rent, for he affirms the alienation in mortmain, and claims in respect thereof the same estate as the bishop had. But in the latter case the rent is revived, for the lessor re-entering defeats the estate of the alienee, the making whereof divested his reversion, and claims such estate as his tenant had before the alienation which was liable to the rent. *Hawk. Abr.* 434, 435.—[*Ed.*]

(q) See ante, 273 a. b. p. 501. n. (c 3).—[*Ed.*]

for that although the fee-simple do drown the remainder for life between them, yet as to a stranger it is *in esse*; and therefore B, shall not have the rent, but his heir shall have it (a).

172 a.
Of a bond.
(566)*

(s) Obligation is a word of his own nature of a large extent; but it is commonly taken, in the common law, for a bond containing a

(a) So if lessee for life make a lease for years rendering rent, and the lessee for life surrender his estate, in this case, although the original estate for life be yielded up, yet the derivative estate for years will continue notwithstanding; but the surrenderee will be entitled to have the rent reserved upon the lease for years: for when the estate of the original lessee is surrendered, the relation between him and his under-tenant ceases: and as the connexion and privity was between the under-tenant and his lessor only, and not between the under-tenant and the original lessor, the under-tenant is, by the rules of law, discharged from all the burthen (as rents and covenants) annexed to his tenancy. *Webb v. Russell*, 3 T. R. 401. And Mr. Preston observes, that it is not clear that a merger does not induce all the same consequences. Such extinguishment clearly is the result, when the estate of the original lease is granted to the owner of the remainder or reversion: so that the grant does, in law, amount to a surrender in fact; and there are not any authorities, nor is there any principle, from which a difference can be collected to distinguish those cases in which the term of the original lease is merged by the accession, or purchase, of the remainder or reversion. 3 Conv. 129, 130. Et vid. *Lord T. v. Barton*, Moor. 94. *Webb v. Russell*, supra. As therefore the under-lease, notwithstanding a surrender or merger, would continue, and the lessee be discharged from the payment of rent, and from all conditions and dependant covenants annexed to his lease; to remedy, in certain cases, these inconveniences, the stat. of 4 Geo. 2. c. 28. was passed, whereby it is enacted, "That in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any of the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived thereout had been likewise surrendered, at or before the taking of such new lease. And that all and every person and persons, in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her, and their executors and administrators, shall be entitled to the rent, covenants, and duties, and have like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands, and tenements, in their respective under-leases comprised, as if the original leases out of which the respective under-leases are derived, had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy by distress and entry, in and upon the messuages, lands, tenements, and hereditaments, comprised in any such under-lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents reserved in the lease out of which such under-lease was derived, as they would have had, in case such former lease had still been continued, or as they would have had in case the respective under-lease had been renewed under such new principal lease; any law, custom, or usage, to the contrary thereof notwithstanding." There is a similar provision in the statute of 39 & 40 Geo. 3. c. 41. which enables bishops, &c. to renew leases by subdividing tenements, and apportioning the rents, &c. Ante, p. 423. n. (s). The effect of the statute of 4 Geo. 2. is merely to authorize surrenders, with a reservation of the privity and relation of landlord and tenant, between the original lessee and his under-lessees, when the original lessee takes a new lease; and to give to the original lessees the same remedies against their tenants, as they might have pursued prior to the surrender. It places the original lessees, and the ground landlord, exactly in the same situation, as if no surrender had been made, and now the ground landlord may distrain on the land for the reserved rent; and the original lessee may recover the rents reserved to himself, and enforce the covenants entered into by the under-lessee. But the statute does not operate to confirm the under-leases: they continue to be precisely in the same state as if no new lease were obtained. 3 Prest. Conv. 140.

Lastly, if lessee for life, or years, make a covenant with his lessor, and afterwards surrenders his estate to him, his breach of covenant is not hereby saved; for the lessor may have an action of covenant notwithstanding the surrender. *Shep. Touch.* 301.—[*Ed.*]

(s) Before we consider the operation of a bond, it will be proper to advert to the two remaining species of derivative conveyances, namely, an assignment and a defeasance.

An assignment is properly a transfer, or making over to another, of the whole interest or

penalty, with condition for payment of money, or to do or suffer some act or thing, &c. and a bill is most commonly taken for a single bond without condition.

estate which the assignor has in lands or tenements; but it is usually applied to the transfer of a term for years. An assignment of a term differs from a lease only in this, that by a lease, the lessor conveys an interest less than his own, reserving to himself a reversion; whereas by an assignment, the assignee parts with his whole interest and property in the thing assigned, and puts the assignee in his place. 2 Bl. Com. 326, 327. 4 Cru. Dig. 160, 161. Although an instrument purports to be a lease, yet if it does, in effect, comprise all the estate of the grantor, it amounts to an assignment, and is not an under-lease; and a right of entry, or reservation of rent will not change the nature of the estate. *Palmer v. Edwards*, Dougl. 187. And on the other hand, if it leaves any portion of the estate in the lessor, even a day, or an hour, or a minute, as a reversion, it is an under-lease; and therefore an instrument purporting to be an assignment for the residue of a term, reserving the last day or hour, will operate as a lease of this description. 2 Prest. Conv. 124, 125. The operative words of an assignment are, assign, transfer, and set over; but any other words which show the intention of the parties to make a complete transfer, will amount to an assignment. And there needs no consideration to support an assignment by a tenant for years, for the tenure and attendance, and the being subject to forfeiture, as also the payment of rent, if there is any, are sufficient to vest the term in the assignee. 1 Mod. 263. But since the Statute of Frauds, an assignment must be by deed. Every estate and interest in lands and tenements, and every present and certain estate or interest in incorporeal hereditaments, as rents, advowsons, &c. may be assigned: and even though the interest be future, as a term for years, to commence at a subsequent period, it may be assigned, for it is vested in *presenti*, though it is only to take effect in *futuro*. Perk. sect. 91. But no right of entry, or re-entry, can be assigned, so that if a person be disseised, and assigns over his right to another, before he has entered on the disseisor, such assignment is void. Ante, 214 a. p. 85. With respect to the assignment of *chooses in action*, see ante, p. 113, n. (x 3). *Delaney v. Stoddart*, 1 T. R. 26. *Winch v. Kealey*, 1 T. R. 619. 3 T. R. 340. *Innes v. Dunlop*, 8 T. R. 595. And note, that an assignment of a chose in action may be by parol as well as by deed. *Howell v. Mac Ivers*, 4 T. R. 690. *Heath v. Hall*, 4 Taunt. 396. With respect to the distinctions as to when the assignee is bound by the covenants of the assignor, and when not, see ante, p. 330, 331, n. (e 3). That an assignee is liable for rent only, while he continues in possession under the assignment, see *Staines v. Morris*, 1 Ves. & B. 11; and that he is not guilty of a fraud, if he assigns over his interest to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession, nor receives the lease, see *Taylor v. Shum*, 1 Bos. & P. 21.

As to the nature and operation of a defeazance, see ante, 236 b. 237 a. p. 192, 123, and the notes there. Et vid. 2 Prest. Conv. 166, 167, 199, 203.

A bond or obligation is a deed whereby the obligor binds or obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to the obligee, at a particular day. If this be all, the bond is called a simple one, *simplex obligatio*. But there is generally a condition added, that if the obligor does some act, the obligation shall be void, or else shall remain in full force; as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money, borrowed of the obligee, with interest; which principal sum is usually one half of the penal sum specified in the bond. 2 Bl. Com. 340. There are no technical words necessary to a bond, Cro. Eliz. 561. 729. 886; and if there be an evident mistake in the word expressing the sum in which the party is intended to be bound; as if it be for *threty* pounds, instead of *thirty* pounds; it will be so construed as to answer the intention of the parties. Cro. Jac. 203. 208. 607. *Cromwell v. Grumden*, 1 Ld. Raym. 325. Et vid. *Waugh v. Russell*, 1 Marsh. 311. So any words by which the intention of the parties can be discovered, are sufficient to make a condition of a bond: for if the words, though improper, should be construed void, and not a condition, then the obligation would be single, and of force against the grantor, although he had performed the condition of it according to the intention of the parties: and the condition being for the benefit of the obligor, shall he construed favourably. *Butler v. Wigge*, 1 Saund. 66. And the extent of the condition of an indemnity bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate. *Parrell v. Summerset*, 4 Taunt. 593. With respect to impossible or void conditions, the following distinction has been taken: that where the condition is under-written or indorsed, that is only void, and the obligation is single; but where the condition is part of the lien itself,

and incorporated therewith (as in a recognizance by bail), if the condition be impossible, the obligation is void. 1 Saund. 66 n. *Pullerton v. Agnus*, 1 Salk. 172. Ante, 206 a. b. p. 21, 22. Where the condition of a bond is entire, and the whole is against law, it is void. But when the condition consists of several different parts, and some of them are lawful, and the others not, it is good for so much as is lawful, and void for the rest. Ibid. Et vid. ante, p. 24, 25, n. (F) and the cases there cited.

When the condition of a bond is not performed, it becomes forfeited, or absolute at law; and is a charge on the personal estate and chattels real of the obligor, but not on his freehold lands; and therefore any settlement or disposition, which he makes in his life-time, of his lands, whether voluntary or not, will be good against bond creditors. For a bond being no lien on lands in the hands of the obligor, much less can it be so when they are given away to a stranger. *Parflow v. Weedon*, 1 Ab. Eq. 149. 4 Cru. Dig. 168. If the obligor in a bond binds himself, without his heirs, executors, and administrators, the executors and administrators are bound, but not the heir. Shep. T. 369. But if he binds himself and his heirs, it will be alien on his heir, who, in default of personal assets, will be bound to discharge it, provided he has real assets of the obligor by descent: so that a bond is said to be a collateral, though not a direct charge on lands. But, properly speaking, it is not an incumbrance upon land; for it does not follow the land like a recognizance and a judgment; and even if the heir at law aliens the land, the obligee in the bond, by which the heir is bound, can have his remedy only against the person of the heir, to the amount of the value of the land, stat. 3 W. & M. c. 14. s. 5; but he cannot follow the land when it is in the possession of a *bona fide* purchaser. Bull. N. P. 175. By stat. 3 W. & M. c. 14. s. 2. all devises of lands are fraudulent and void, as against bond creditors, who may sue the heirs of the obligor, and also his devisees jointly. An estate in reversion is within this act; and so is a devise of the reversion by the heir of the obligor; and in such case the lands devised are liable. *Kinaston v. Clarke*, 2 Atk. 204. With respect to what shall be assets for payment of bond debts, see ante, p. 152. n. (R). On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law; but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought; viz. his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed; the damages sustained upon non-performance of covenants; and the like. And a similar practice having gained some footing in the courts of law, the stat. 4 & 5 Ann. c. 16, enacted, that, in case of a bond, conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited, and a suit commenced thereon, shall be a full satisfaction and discharge. In general there can be no remedy at law beyond the penalty, for a man can have no more than his debt; and the penalty is the utmost of his debt. *Wilde v. Clarkson*, 6 T. R. 303. *Shutt v. Proctor*, 2 Marsh. 226. Et vid. *McClure v. Dunkin*, 1 East. 136, in which it was determined, that in an action on a judgment recovered on a bond, interest might be recovered in damages beyond the penalty; but Lord Kenyon admitted, that if the action had been upon the bond, it would have been otherwise. And where the obligee is plaintiff, equity in general will not carry the debt beyond the penalty: he having made himself the judge of his own recompense. See *Hale v. Thomas*, 1 Vern. 360, *Anon.* 1 Salk. 154. *Steward v. Rumball*, 2 Vern. 509. *Galway Corporation v. Russell*, 2 Bro. P. C. 275. *Bromley v. Goodere*, 1 Atk. 75—80. *Tew v. Earl of Winterton*, 3 Bro. C. C. 489. *Knight v. Maclean*, 3 Bro. C. C. 496. *Grosvenor v. Cook*, Dick. 305. *Gibson v. Egerton*, Dick. 408. *Kettleby v. Kettleby*, Dick. 514. *Lloyd v. Hatchel*, 2 Anstr. 525. *Sharp v. Earl of Scarborough*, 3 Ves. 557. *Mackworth v. Thomas*, 4 Ves. 329. But it is otherwise where the obligee is defendant: for then the maxim applies, that he who will have equity must do equity. 1 Eq. Ab. 92, pl. 7. *Hale v. Thomas*, supra. And equity will, under special circumstances, carry a debt beyond the penalty, as where a man is kept out of his money by an injunction, or is prevented from going on at law, *Duval v. Terry*, Show. P. C. 15. *Hale v. Thomas*, supra; or where an advantage is made of money, *Lord Dunsany v. Plunkett*, 2 Bro. P. C. 251; or where a bond is only taken as a collateral security, *Kirwan v. Blake*, 2 Bro. P. C. 333; or where the recovery of the debt is delayed by the obligor, *Pulleney v. Warren*, 6 Ves. 192; or there are some other special circumstances. *Clarke v. Seaton*, 6 Ves. 416. Bonds being choses in action, are assignable in equity. But the assignee takes them, subject to all the obligee's equity. *Coles v. Jones*, 2 Vern. 692. *Turton v. Benson*, 2 Vern. 765. But time and circumstances may strengthen the case of an assignee. *Hill v. Caillorel*, 1 Ves. 122. As to the presumption of satisfaction of a bond from length of time, see ante, vol. 1. p. 13. n. (E).

A recognizance is an obligation of record, which a man enters into before some court of record, or magistrate duly authorized, (Bro. Abr. tit. Recognizance, 24), with condition to

CHAP. XLIII.*

*(570)

SAME SUBJECT.

OF CONVEYANCES UNDER THE STATUTE OF USES, ETC.

NOTA, an use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cesty que use* shall take the profit, and that the terre-tenant shall make an estate according to his direction. So as *cesty que use* had neither *jus in re*, nor *jus ad rem*, but only a confidence and trust, for which he had no remedy by the common law, but for breach of trust his remedy was only by subpœna in Chancery (A).

272 b.
Definition of
an use at
common law.
Pl. Com. 152 b.
in D. Lamere's
case, and
319 b. Lib. 1.
fol. 121, 122.
127, 140. in
Chudley's
case. Lib. 2.
fol. 58, 78.
Lib. 6. fol. 64.
Lib. 7. fol. 13.
& 34.

do some particular act; as to appear at the next assizes, to keep the peace, to pay a sum of money, or the like. It is in most respects similar to a bond, the difference being chiefly, that the bond is the creation of a new debt or obligation: whereas a recognizance is the acknowledgment upon record of a former debt: the form whereof is, "that A. B. doth acknowledge to owe to our lord the king, or to C. D. the sum of ten pounds," with condition to be void on performance of the thing stipulated. This being either certified to, or taken by the officer of some court, it is witnessed only by the officer of that court, and not by the party's seal, so that it is not in strict propriety, a deed, though the effects of it are greater than those of a bond, being allowed a priority in payment. 2 Bl. Com. 341. A recognizance is a lien upon all the lands which the cognizor has at the time he acknowledges it, and also upon all those which he afterwards acquires; so that no alienation by the cognizor will prevent the cognizee from extending the land. And where a reversion expectant on an estate tail falls into possession, it then becomes liable to the recognizances, not only of the original donor, but also of all the intermediate heirs who were entitled to such reversion, because it is a direct lien on lands, and differs in that respect from a bond. Ante, p. 152. n. (n). But by the statute 29 Cha. 2. c. 3, it is enacted, that no recognizance shall bind lands in the hands of *bona fide* purchasers, but from the time of the inrollment. Et vid. 8 Geo. 1. c. 25. There are two other kinds of recognizances of a private sort, which are said to be in the nature of a statute merchant and statute staple, as to which, see post, Book III. Chap. XI. Of Execution.—[Ed.]

(A) We purpose, in this note, to consider the doctrine of uses under three general heads, viz. 1st. With respect to the origin and nature of uses before the stat. 27 H. 8. c. 10; 2dly. Of uses since that statute; and, 3dly. Of the rules applicable to limitations of uses since the statute. The different kinds of conveyances derived from the statute of Uses, and the doctrine relating to uses which are not executed by the statute, and to trusts, will be explained in the subsequent notes to this chapter.

1st. With respect to the origin and nature of uses before the stat. 27 H. 8. c. 10. The original simplicity of the common law admitted of no immediate estate in lands, which was not clothed with the legal seisin and possession thereof. But, in process of time, a right to the rents and profits of lands, whereof another person had the legal seisin and possession, was introduced; and, though not recognized for a long time by the courts of common law, was, notwithstanding, supported by the court of chancery, and became well known by the name of a use. The introduction of this novelty, though, at first, it appears to have been but a trivial innovation, has, in its progress, produced a revolution in the system of real property, and given rise to a mode of transferring land very different from that which the old law had established. A use was created in this manner:—The owner of lands conveyed them by feoffment, with livery of seisin, to some friend; with a secret agreement, that the feoffee should be seised of the lands, to the use of the feoffor, or of a third person. Thus the legal seisin was in one; and the use, or right to the rents and profits in another. It is uncertain when this distinction between the legal seisin, and the right to the rents and profits, was first introduced. But it is clear that the practice of conveying lands to one per-

- (571)* *A feoffee to the use of A. and his heirs, before the statute of 29
 271 b. H. 8. for money bargaineth and selleth the land to C. and *his heirs.
 (572)*

son to the use of another, did not become general until the reign of Edw. 3, when the ecclesiastics adopted it, in order to evade the statutes of mortmain, by procuring conveyances of land to be made, not directly to themselves, but to some lay persons; with a secret agreement that they should hold the lands for the use of the ecclesiastics, and permit them to take the rents and profits. The idea of a use, and the rules by which it was first regulated, are now generally admitted to have been borrowed by the ecclesiastics, from the *fidei commissum* of the civil law. Bac. Read. 19. 2 Bl. Com. 327, 328. 1 Cru. Dig. 393. And by analogy thereto, the clerical chancellors assumed the jurisdiction of compelling the execution of uses in the court of chancery; and enforced this jurisdiction by devising, or rather adopting from the common law courts, the writ of subpoena, to oblige the feoffee to attend in court, and disclose his trust. 3 Reev. Hist. 192. The use, of which a definition has been given above, consisted of three parts:—that the feoffee should suffer the feoffor to take the profits; that the feoffee, upon request of the feoffor, or notice of his will, would execute the estates to the feoffor, or his heirs, or any other by his direction; that if the feoffee had been disseised, and so the feoffor disturbed, the feoffee would re-enter, or bring an action to recontinue the possession. Bac. 10. 1 Sand. 2. This right in equity to the rents and profits of the land, which constituted a use, was not issuing out of the land, but was collateral thereto, and only annexed in privity to a particular estate in the land; that is to say, the use was not so attached to the land that when once created, it must still have existed, into whose hands soever the lands passed, as in the case of a rent, a right of common, or an advowson appendant; but it was created by a confidence in the original feoffee, and continued to be annexed to the same estate, as long as that confidence subsisted, and the estate of the feoffees remained unaltered. So, that, to the execution of a use, two things were absolutely necessary; namely, confidence in the person, and privity of estate. 1 Co. 122 a. Plowd. 352. Poph. 71, 72. Confidence in the person, signified that trust which was reposed in the feoffees, and arose from the notice which was given them of the use, and of the persons who were intended to be benefited by the feoffment. Ibid. The idea of confidence in the person was at first extremely limited, for it only extended to the original feoffee; but it was settled, in the reign of Hen. 6. that a subpoena would lie against all those who came in in the *per*, without paying a valuable consideration; and also against all those who had notice of the former uses, although they did pay a valuable consideration. Keil, 42. But if a feoffee to uses enfeoffed a stranger of the land for valuable consideration, who had no notice of the use, as there was no confidence in the person, either expressed or implied, the use was destroyed, and the new feoffee could not be compelled to execute it. 1 Co. 122 a. With respect to privity of estate, it is observable, that a use was a thing collateral to the land, and only annexed to a particular estate in the land, not to the mere possession thereof; so that, whenever that particular estate in the land, to which the use was originally annexed, was destroyed, the use itself was destroyed. Therefore the disseisor, the lord by escheat or forfeiture, or tenant by curtesy or in dower, although they had full notice of the use, yet they were not liable to perform the trust; because they were not in the *per*, that is, in privity of the estate to which the use was annexed; but claimed an estate paramount to that which was liable to the use. Ibid. With respect to the persons who were capable of being feoffees to uses, all private persons whom the common law enabled to take lands by feoffment, might be seised to a use, and were compellable in chancery to execute it. A feme covert and an infant, though under years of discretion, might be seised to a use. Bac. Read. 58. But no corporate body could be seised to a use, because the court of chancery could not issue any process against them to execute the use; and a corporation cannot be intended to be seised to any other's use. Plowd. 102. Neither could the king, nor the queen regnant, on account of their royal capacity, be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the use. Bac. 56. So a queen consort could not be seised to a use. Bac. 57. With respect to the species of property which might be conveyed to uses, it was held, that nothing whereof the use was inseparable from the possession, such as annuities, ways, commons, &c. *quæ ipso usu consumuntur*, could be granted to a use; but that all corporeal hereditaments, as also incorporeal inheritances, which were *in esse*, as rents, advowsons in gross, local liberties and franchises, might be conveyed to uses. W. Jones, 127. The rules by which uses were governed, were derived from the civil law, and differed materially from those by which real property was regulated in the courts of common law. Hence, Lord Bacon observes, that used stood upon their own reasons, utterly differing from cases of possession. Read. 13. Thus, by

who hath no notice of the former use ; yet no use passeth by this (272)*
bargain and sale, for there cannot be two uses **in esse*, of one and

Cannot be
two uses in
esse of the
same land.

the common law, a feoffment was good without any consideration, but uses could not be raised without a consideration. Ibid. Uses were alienable, Id. 16; and by the stat. 1 R. 3. c. 1. *cestui que use* in possession might have conveyed the legal estate, without the consent of the feoffees. In the alienation of uses, which might be by any species of deed or writing, except a feoffment and livery, which was foreign to its nature, no words of limitation were necessary. 1 Co. 87 b. 100 b. Uses might be limited so as to change from one person to another, by matter subsequent, as upon the happening of some future event. For though the rules of the common law do not allow a fee-simple to be limited after a fee-simple, yet the court of chancery admitted this species of limitation to be good in the case of a use. Bac. 18. So uses were revocable. Ante, 237 a. p. 123. 3 Ch. Ca. 66. Uses were devisable, although, at that time, lands were not Bac. 20. 1 Co. 123 b. Uses, however, were descendible according to the rules of the common law respecting estates of inheritance. Bac. 11. 2 Rol. Abr. 780. Ante, 14 b. p. 179. n. 40. A use not being considered as an estate in the land, was not an object of tenure; and was therefore freed from all those oppressive burthens which were the consequences of the feudal system, viz. wardship, marriage, relief, and escheat. Ante, 76 b. vol. 1. p. 299. But *cestui que use*, in respect to the legal ownership of the land, had neither *jus in re*, nor *ad rem*. 1 Co. 121 b. W. Jones, 127. Bac. Uses, 5. Therefore, when in possession, he was considered merely as tenant by sufferance. Bro. Feoff. al. Uses, 39. Plowd. 3 a. 22 Vin. 286. pl. 2 & 3. He could not bring an action, avow, nor justify for damage faisant in his own name. Bro. Feoff. al. Uses, pl. 39. 136. So his wife was not dowerable of the use, Perk. s. 349; and the husband of feme *cestui que use* could not have his curtesy. Ibid. 463. 1 Co. 123 b. *Cestui que use* did not forfeit his lands for treason nor felony, Jenk. Cent. 190; and the use was not considered as assets in the hands of the heir nor executor, to satisfy creditors. 1 Co. 121 b. 1 Sand. 60, 61. *Cestui que use*, indeed, might have been sworn upon an inquest: but this rule was established under particular circumstances. See post, 272 a. As to the feoffee, he was complete owner of the land at law; he performed the feudal duties; his wife had dower, Bro. Feoff. al. Uses, pl. 10; and his estate was subject to wardship, relief, &c. He had power of selling the lands, and forfeited them for treason or felony. In short, he might have brought actions, and have exercised every kind of ownership over, or in respect of the lands. Dy. 96. Jenk. 190. 1 Sand. 62. Such was the state of uses at the time when it was deemed expedient to pass the stat. 27 H. 8. c. 10, commonly called the statute of Uses; which enacts, "that when any person shall be seised of any lands, to the use, confidence, or trust, of any other person or persons, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, will, or otherwise: then, and in every such case, the persons having the use, confidence, or trust, shall from thenceforth be deemed and adjudged in lawful seisin, estate, and possession, of and in the lands, in the same quality, manner, and form, as they had before in the use."

2d. Of uses since the stat. 27 H. 8. c. 10. Whatever might have been the intention of the legislature, the statute 27 H. 8. c. 10. certainly did not abolish the practice of conveying to uses: it has merely destroyed the intervening estate of the feoffees or grantees; and thereby converted the equitable into a legal estate. 1 Saund. 80—82. With respect to the circumstances necessary to the execution of uses by this statute, there are, 1st. A person seised to the use of some other person: 2d. A *cestui que use in esse*; and, 3d. A use *in esse* in possession, remainder, or reversion. 1 Co. 126 a. 1st. As to the person seised to the use, the statute did not, nor indeed could, alter the nature of the use, *Cowper v. Franklin*, 3 Bulst. 185; and it therefore follows, that a person not capable before the statute of being seised to a use, cannot be a grantee after it. The several persons incapacitated to stand seised to uses have been already mentioned; and it is only necessary to remark in this place, that if an alien be enfeoffed to uses, or if a person having committed treason is made grantee to uses, and is afterwards attainted (Bac. 58, 59.), the statute executes the use until office found; but upon office being found, the use is destroyed by relation. Bac. 59. *King v. Boys*, Dy. 263 b. pl. 31. With respect to the estate of which a person may be seised to uses, it is observable, that the word "seised" extends to every estate of freehold; though it seems that, before the statute, all feoffees to uses must have been seised in fee. 1 Sand. 40. It was formerly much doubted whether a tenant in tail could be seised to a use, *Cowper v. Franklin*, 2 Co. 78 a. 3 Bulst. 184. Cro. Jac. 400. Moor. 848. 1 Rol. Rep. 384. 2 Rol. Abr. 780. Shep. Touch. 509. Jenk. 195; but it seems to be

(574)* the same land; and seeing there is no transmutation of possession by the terre-tenant, the former use *can neither be extinct nor

(2 Rol. Abr. 797. 1 Rep. 129 b. 192 b. Stat. 27 H. 8. c. 10. Plow. 348. 1 Rep. 127. Sid. 26.)

now settled, that the statute will execute a trust declared upon the estate of a tenant in tail. Godb. 269. Bac. 57, 58. Dy. 311 b. 1 Sand. 85. 1 Cru. Dig. 427. And it is clear that the statute will execute the use declared upon the seisin of a grantee for life; but such use will determine, together with the legal estate, transferred to it by the statute, upon the death of the tenant for life. Dy. 186 a. *Crawley's case*, Cro. Eliz. 721. Cro. Car. 231. *Williams v. Jekyll*, 2 Ves. 682. With respect to what kind of property may be conveyed to uses, it is observable, that the words of the statute comprehend every species of real property in possession, remainder, or reversion; and therefore not only corporeal hereditaments, but also incorporeal ones, as advowsons, rents, &c. may be conveyed to uses. Nothing however can be conveyed to uses but that whereof a person is seised at the time; for in law every disposal supposes a precedent property; and therefore no man can convey a use in land, of which he is not in possession, when the conveyance is made. Cro. Eliz. 401. 2 Rol. Abr. 790. Copyhold estates, also, are not within the statute. Co. Copyh. s. 54. Gilb. Ten. 182. Cowp. 709. 2dly. A *cestui que use in esse* is necessary to the execution of a use by this statute. If therefore a use be limited to a person not *in esse*, or to a person uncertain, it will be void. Bac. 42. 60. All persons capable of taking lands by any common law conveyance, may be *cestui que use*. And by the statute a *cestui que use* may be entitled to an estate in fee-simple, or fee-tail, term of life, or for years, or otherwise; or in remainder or reversion. The king may be a *cestui que use*, Bac. Read. 60; and so may a corporation. The *cestui que use* must in general be a different person from him who is seised to the use; for the statute says, "that where any person or persons stand or be seised, &c. to the use, confidence, or trust of any other person, &c." And therefore if a use be limited to a feoffee, conusee, recoveror, or releasee, such use, generally speaking, is not executed by the statute, but the feoffee, &c. is in by the common law. *Samme's case*, 13 Co. 56. *Altham v. Anglesey*, Gilb. Rep. 16, 17. 2 Cas. & Op. 294. *Long v. Buckeridge*, 1 Stra. 106. Bac. Uses, 43. 62. *Guam v. Roe*, 1 Salk. 90. *Jenkins v. Young*, Cro. Car. 230. 214. He has however not only a seisin but a use, although not the use which the statute requires; and therefore that seisin, which, before the limitation of the use to himself, was open to serve uses declared to a third person, is by the limitation filled up, and will not admit of any other use being limited on it; upon the principle, that a use cannot be limited upon a use. *Tippins v. Cosins*, Comb. 313. And. 37. pl. 95. Bac. Uses, 63. 1 Sand. 86—89. There are, however, some cases, where the same person may be seised to a use, and also *cestui que use*. See 1 Cru. Dig. 431, 432. 1 Sand. 90, 91. 3d. A use *in esse* in possession, remainder or reversion, is the third circumstance necessary to the execution of a use by this statute. 1 Co. 126 a. When all these circumstances concur, the possession and legal estate in the land, out of which the use was granted, is immediately taken from the feoffee to uses, and vested in the *cestui que use*; and the possession thus transferred is not a mere seisin or possession in law, but an actual seisin and possession in fact; not a mere title to enter upon the land, but an actual estate; and, consequently, it is subject to escheat, to curtesy, dower, and all the incidents to which a legal estate is liable. Bac. Read. 416. 1 Sand. 119, 113. 1 Cru. Dig. 433. Rents conveyed or limited to uses, are executed by the statute; and *cestui que use* is entitled to all remedies and rights relative thereto; but not to collateral rights. *Boscawen and Herle v. Cook*, 1 Mod. 223. 2 Mod. 138. The fourteenth section of the statute of Uses, which vests in *cestui que use* the same or the like advantage, benefit, voucher, &c. is expressly confined to estates made before the 1st of May, 1536; and from this circumstance there is ground to suppose, that none of these benefits would have been carried to the *cestui que use* by the general words of the acts. But it is clear, that *cestui que use* is entitled to all benefits and advantages inherent to the estate, and to covenants running with the land. Ante, 215 a. b. p. 91. *Appouel v. Monnoux*, Mo. 97. 3 Leon. 225. *Smith v. Tyndall*, 2 Salk. 685. *Roll v. Osborne*, Mo. 859. pl. 1180. It is said, however, that, as the statute only transfers the legal estate to the use, it does not interfere with the title deeds; and, therefore, that the feoffee or grantee to uses is entitled to them. *Estoffe v. Vaughan*, Dyer, 277 a. *Stockman v. Hampton*, Cro. Car. 441. *Huntingdon v. Mildmay*, Cro. Car. 217. *Reynell v. Long*, Carth. 315. *Whitfield v. Fausset*, 1 Ves. 367. 394. 3 T. R. 156. 1 Sand. 112. Sed vid. ante, p. 355. n. (55). 4 Cru. Dig. 903, 904. The third section of the statute contains a saving, "to all and singular those persons, and

altered. And if there could be two uses of one and the same land, *272 a. then could *not the said *statute execute either of them for the un- (575)*

to their heirs, which be or hereafter shall be seised to any use, all such former right, title, entry, interest, possession, rents, customs, services, and action, as they, or any of them, might have had to his or their own proper use, in or to any manors, lands, tenements, rents, or hereditaments, whereof they be, or hereafter shall be, seised to any other use, as if this act had not been made;" in consequence whereof, no term for years or other interest, of which a person, to whom lands are conveyed to uses, is possessed in his own right, will be merged by such conveyance. 7 Co. 19 b. 20 a. *Ferres and Curson v. Ferman*, Cro. Jac. 643. *Cook v. Fountain*, 1 Vent. 195, 280. 3 Prest. Conv. 364—373. Ante, p. 559. n. (x). The necessity of supposing some person to be seised to a use before it can be executed by the statute, gave rise to the doctrine of a possibility of seisin, or *scintilla juris*, in feoffees, releasees, &c. to uses, when all actual estate is taken from them by the operation of the statute. This possibility of seisin is supposed to exist in two particular cases: first, upon the limitation of springing uses; secondly, upon the creation of contingent uses. 1st. If a feoffment, or lease and release be made, a fine levied, or recovery suffered to A. and his heirs, to the use of B. and his heirs, until C. pay a sum of money, and then to the use of C. and his heirs; in this case the use is executed in B. and his heirs by the statute: and as this use is coextensive with the seisin of A. there can be afterwards no actual seisin remaining in him: but when C. pays the money, the former use to B. ceases, and a new use springs up, and is executed in C. in fee. The question is, out of whose seisin is the secondary use to be served? It cannot be served out of the possession of B., because he is *cestui que use*; nor out of the original seisin of the feoffor, &c.; because the livery, &c. entirely divested him of all possession whatever. 1 Leon. 269. Neither could the use to C. be executed until payment of the money; because the two uses could not exist at the same time. Ante, 271 b. p. 571. To avoid these difficulties, it was said, that the use should arise out of the original seisin of A. the grantee; that although no actual seisin remained in him after the execution of the use to B., yet upon the cesser of the use limited to B., the original seisin reverted to A. for the purpose of serving the secondary use to C.: and that before the money was paid, this possibility of reverting of the original seisin should be considered as a *possibility of seisin*, or *scintilla juris*. 2dly. A feoffment is made to J. S. in fee, to the use of A. for life, remainder to the use of his first son unborn in tail, with remainder to the use of B. in fee. Does any and what seisin remain to J. S. until the birth of a son of A.? The solution of this question formed the great difficulty in *Chudleigh's case*, 1 Co. 120 a. On the one hand it was said, that an actual estate in remainder vested in J. S. to serve the contingent use, when it came *in case*: whilst others were of opinion, that no part of the original seisin remained in J. S., and that the contingent use, when it should arise, must be served out of the former seisin of the grantee: that is to say, that as the whole seisin was taken out of J. S., so much of it as was necessary to serve the contingent use, when it came *in case*, should remain in the preservation and custody of the law, and should not return to, or revert in him. But both these opinions were considered erroneous; for, with regard to the first, as the use was limited to A. for life, remainder to B. in fee, this was commensurate to the whole fee, and did not admit of any intervening estate, until that limited to the son should arise; besides, if J. S. had a vested estate in remainder, he might enter for a forfeiture, and punish waste, &c.; and it is clear, that the parties intended him no such benefit. With respect to the second notion, it was thought to be against the words and meaning of the statute, which requires the grantee to be seised *at the time of the execution of the use*. But the true construction appears to be, that J. S. had not an actual estate or seisin during the suspense of the contingency; nor is the whole seisin taken from him, but that the possession is executed according to the limitation of the uses; that as a new use will arise upon the birth of A.'s son, so as to precede the limitation to B., so upon that event a seisin, coextensive with the estate in use limited to such son, will vest in J. S. for the purpose of serving it: and that until the contingency happens, J. S. has a mere possibility of seisin, which may never become actually vested in him. 1 Sand. 103—106. Booth's Opina at the end of Shep. Touch. *Maundrell v. Maundrell*, 10 Ves. 255.

3d. With respect to the rules applicable to limitations of uses since the statute, it is settled, that the same words, which are necessary to create an estate in fee upon a conveyance at common law, are equally necessary upon a conveyance to uses since the statute. *Corbet's case*, 1 Co. 87 b. Jenk. 332. pl. 65. *Foster v. Romney*, 11 East. 594. *Abraham v. Twigg*, Cro. Eliz. 478. So the word *heirs* is equally necessary to create an estate tail

(*Ante*, 22b.) certainty. But if A. disseise one to the use of B., and A. doth (576)* bargain and sell *the land for money to C., C. hath an use; and here

in deeds, operating by way of use, as in conveyances at common law. *Nevel v. Nevel*, 1 Roll. Abr. 837. 1 Brownl. 152. *Makepeace v. Fletcher*, Com. Rep. 457. *Ante*, 20 a. vol. 1. p. 519. But with respect to words *regulating* or *modifying* an estate, words of modification of less definitive import, than those required in common law conveyances, will suffice in a deed operating by way of use. Thus it has been determined, that the words "equally to be divided," will create a tenancy in common, in a conveyance to uses, as well as in a will. *Rigden v. Vallier*, 2 Ves. 252, 257. 3 Atk. 731. *Goodtitle v. Stokes*, 1 Wils. 341. 2 Vent. 365. 2 Prest. Conv. 471. Sed vid. *Stratton v. Best*, 2 Bro. C. C. 233. 2 Cas. and Op. 279. As to the cessor of the estate of tenant in tail during his life, we have seen that it is a maxim of law, that a condition or limitation annexed to an estate, ought to destroy the *whole* of the estate, to which it is annexed, and not a *part* only of it. *Ante*, sect. 720, 721, 722, 723. p. 289—292. 1 Co. 86 b. 4 Burr. 1941. This rule is applicable to limitations by way of use, which operate so as to defeat or avoid estates: therefore, if an estate be limited to the use of J. S. *in tail*, with a proviso, that if he do such an act, his estate shall cease *during his life*, this proviso is void. 1 Co. 86 b. Et vid. *Cholmley v. Humble*, cited 1 Co. 86 a. *Corbet's case*, Ibid. 83 b. *Mildmay's case*, 6 Co. 40 a. *Tarrant's case*, Moor. 470. However, as a condition may be annexed to an estate tail to determine it *wholly* by the re-entry of the donor or his heirs, (*ante*, sect. 362. p. 28. *Croker v. Trevillian*, Cro. Eliz. 35. 1 Leon. 292), so a limitation by way of use may enure to defeat an estate tail, as if tenant in tail were dead, *without heirs of his body*. *Mary Portington's case*, 10 Co. 36. This doctrine has given rise to the introduction of two species of provisos in modern practice. The one is adopted in a settlement of estates, where it is intended, that the person in possession of them, under the settlement, should use the name, and bear the arms of the settler; and in case of refusal or neglect, that the uses and estates thereby limited, shall cease and determine, as if the person so refusing or neglecting, being tenant for life, were dead, or being tenant in tail, were dead without issue, inheritable under the entail. 1 Sand. 120. Et vid. for the form of such power, *ibid*. Appendix, No. 1. 2 Bridg. Con. 8. 10. 469. 575. The other proviso is used in settlements, for the purpose of defeating the estate of a tenant in tail, in case he shall become entitled to a certain other estate; and limiting or shifting the use upon that event, to another person, as if such tenant in tail were dead without issue. 1 Saund. 120. *Ibid*. Appendix, No. 2. 1 Bridge. Con. 304. *Nicolls v. Sheffield*, 2 Bro. C. C. 215. *Doe v. Henaoze*, 4 T. R. 13. *Stanley v. Stanley*, 16 Ves. 491. It is also observable, that a man cannot make a fraction in an estate, in the case of a limitation by way of use, which cannot be done in a conveyance by livery in possession. Therefore if a man makes a feoffment in fee of land to the use of A. and his heirs every Monday, and to the use of B. and his heirs every Tuesday, and to the use of C. and his heirs every Wednesday, these limitations are void. Per Walmsley, J. 1 Co. 87 a. Nor can uses be limited so as to abrogate the law. Thus, if there be a limitation to the use of A. and his heirs, provided that if he give a mortal blow to any person, the use shall cease as to him, and remain over; this is fraudulent to prevent an escheat, and therefore void. Moor. 633. 3 Atk. 180. With respect to limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law, it is observable, that at common law, if a feoffment had been made to a stranger and the feoffor, the stranger took the whole, Perk. s. 203; but now, if a feoffment be made to the use of the feoffor, or to the use of the feoffor and a stranger, it is a good limitation of the use, and the statute executes it in the feoffor alone in the first instance, and in him and the stranger in the second. And this method of vesting the legal estate in the grantor by his own conveyance, can be effected by a feoffment, fine, recovery, or lease and release; for in each of these, the seisin is conveyed to the feoffee, &c. and that seisin is sufficient to serve uses declared to the feoffor, &c. or to any other person. But in a bargain and sale, where the use first passes, and then the possession is executed in the bargainee by the statute, no other use can be declared upon this estate; according to the rule, that a use cannot be limited to arise out of a use. Dyer, 155 a. b. 1 Co. 136 b. 137 a. And yet a man may covenant to stand seised to the use of himself. 1 Sand. 123. As a man could not, at common law, convey to himself, so neither could he make a conveyance to his wife, *Moyses v. Giles*, 2 Vern. 385. *Lucas v. Lucas*, 1 Atk. 371. n. 2, last ed. *Ante*, 3 a. vol. 1. p. 132. n. 9; but by limiting a seisin to the feoffee, releasee, &c. he may declare the use to his wife, which will be executed by the statute. *Ante*, 112 a. vol. 1. p. 130. By the common law, we have seen, a man could not make

be two uses of one land, but of several natures; the one, viz. upon the *bargain and sale to be executed by the statute, and the other (577)* not.

his own heir a *purchaser*, even of an estate tail, ante, 22 b. p. 141; but a man may limit the uses so as to make his heirs *special* take either by *purchase* or descent. Ibid. Et vid. *Wills v. Palmer*, 5 Burr. 2615. 2 Bl. Com. 687. *Tippin v. Cosin*, Carth. 272. 4 Mod. 380. *Else v. Osborne*, 1 P. Wms. 387. Fearn. Cont. Rem. 54—62. 4th edit. A grantor, however, cannot even under a conveyance which operates by way of use, enable his heir *general* to take a remainder as purchaser, under a limitation to his *heirs*; but where the limitation is to the right heirs of the grantor, the use so limited, is construed to be the old fee, and will be executed in him as the *reversion in fee*, and not as a remainder. 1 Co. 129 b. 130 a. *Godolphin v. Abington*, 2 Atk. 57. *Fenwick v. Milford*, Moor. 284. 1 Leon. 182. *Read v. Errington*, Cro. Eliz. 321. *Earl of Bedford's case*, Moor. 718. 1 Co. 130 a. Cro. Eliz. 334. *Bingham's case*, 2 Co. 91 b. Ante, 22 b. p. 141. n. 7. So it is a rule of law, that if an estate be conveyed to two, the one being capable, and the other incapable, at the time of the grant, he who is capable shall take the whole, 1 Co. 100 b. 13 Co. 57; and that joint-tenants cannot take at different periods, 2 Rol. Abr. 417. pl. 8. Ante, 9 a. vol. 1. p. 496. 188 a. vol. 1. p. 732: But since the introduction of uses, if A. make a feoffment in fee to the use of B. and his wife, that shall be; though the whole estate will vest in B. at first, yet upon his marriage, the wife shall take jointly with him. *Mutton's case*, Moor. 96. *Dyer*, 274 b. 1 Co. 101 a. *Samme's case*, 13 Co. 57. Et vid. *Wells v. Fenton*, Moor. 634. *Stratton v. Best*, 2 Cro. C. C. 233. Ante, 188 a. vol. 1. p. 732. No estate of freehold, can, by the common law, be granted to commence in *futuro*, *Barwick's case*, 5 Co. 94 b. 2 Vent. 204. *Roe v. Tranmer*, 2 Wils. 75; neither can a contingent remainder be supported without an express particular estate of freehold, ante, 217 a. p. 14: But in conveyances to uses, the courts have supported these future limitations, when no particular estate has been created, either in the shape of remainders, or as springing uses. 1 Atk. 586. 1 Sand. 128, 129. Thus, if a man covenant to stand seised to the use of the heirs of his own body (Carth. 263. 22 Vin. 283. pl. 2. and the cases cited in the notes there), or to the use of another after his own death (*Ozman v. Sheafe*, 3 Lev. 370. *Roe v. Tranmer*, supra), or if he bargain and sell his lands after seven years, Bac. Uses, 63; in each of these cases the grant is good, and until the event takes place, the use results. 1 Sand. 129. But in conveyances operating by way of transmutation of possession, it is necessary that a present seisin should be transferred, in order to serve the resulting use. Thus, if a feoffment, or lease and release, be made to I. S. and his heirs, to the use of I. S. and his heirs, to commence four years from thence, or after the death of the grantor, the limitation of the use to I. S. is good; for during the four years, or the life of the grantor, it will result and be executed. 2 Salk. 675. But if the conveyance had been to I. S. and his heirs after the death of the grantor, to the use of I. S. and his heirs, it would have been void; because it is the grant of an estate of freehold to commence in *futuro*. *Roe v. Tranmer*, 2 Wils. 75. *Lumb v. Archer*, 1 Salk. 225. When a feoffment is made to A. and his heirs, to the use of the heirs of the body of the grantor, the limitation to the heirs of the body takes effect upon the death of the grantor, not as a springing use, but as a remainder; and the use resulting to the grantor for his life by way of particular estate, the grantor, by the union of the particular estate and the remainder, becomes tenant in tail in possession. 1 Rol. Rep. 240. 22 Vin. 283, and the cases cited, in note to pl. 25. 2 Freem. 235. pl. 307. 258. pl. 336. 1 Sand. 97, 98. If the whole fee had resulted to the grantor, the heirs of his body would have taken as purchasers, by way of springing use: but the decision is formed upon the true construction of the statute of Uses: that so much of the use as the grantor has not disposed of, and no more, results to him. 1 Sand. 130. It is also a maxim of the common law, that no estate can be limited upon a fee-simple; or, in other words, an estate in fee-simple cannot be made to cease as to one, and take effect by way of limitation, upon a contingent event, in favour of another person, *Scymor's case*, 10 Co. 97 b. 1 Salk. 231. pl. 9. Dy. 33 a. 1 Co. 85 b. 10 Mod. 423. Plowd. 29. Ante, 18 a. vol. 1. p. 503—505. 143 a. vol. 2. p. 126, 127. Fearn. Cont. Rem. 4th ed. 8: but it is clearly settled that limitations of this kind may take effect by way of use. Bro. Abr. Feoff. al. Uses, pl. 30. cites 6 Ed. 6. B. N. C. pl. 423. *Spring v. Caesar*, 1 Rol. Abr. 415. pl. 12. *Harvell v. Lucas*, Moor. 99. *Earl of Kent v. Steward*, Cro. Car. 358. Such a shifting or springing use, after a previous limitation of the fee, cannot be barred by the *cestui que use* by any kind of conveyance, *Lloyd v. Carew*, Prec. Ch. 72. Pig. Rec. 134. Palm. 139—135. Bro. Feoff. al. Uses, pl. 50. B. N. C. 137: in which respect it differs from a contingent

(578)* *Note, uses are raised either by transmutation of the estate, as by 271 b. fine, feoffment, common recovery, &c. or out of the state of the On what con-

remainder, which may be destroyed; but it agrees with an executory devise after a previous devise of the fee. *Pells v. Browne*, Cro. Jac. 590. 1 Eq. Ab. 187. However, if a man covenant to stand seised to the use of himself in fee, until marriage, and then to the use of himself and his intended wife, and the heirs of his body, with remainders over; he may before marriage destroy the future or contingent uses, by making a feoffment in fee, in tail, or for life, upon a good consideration, and without notice, *Wood v. Reynold*, Cro. Eliz. 764, 765. 854, cases collected in note to pl. 4. 22 Vin. 225, and pl. 1. 224. Gilb. Uses, 125; but a lease for years would not destroy it, although it would bind the future use. *Bould v. Wynston*, Cro. Jac. 168. 1 Sand. 138. It is also a maxim of the common law, that every remainder must be limited, so as to await the determination of the particular estate, before it can take effect in possession. Plowd. 24. Fearn. Cont. Rem. 9. 390. 394. *Cogan v. Cogan*, Cro. Eliz. 360: but it is clear, that if a seisin in fee be limited to I. S. to the use of A. in tail, or for life, provided that if B. return from Rome, then the lands shall remain to the use of C. in fee; the limitation to C. will vest in abridgment of the estate limited to A. 2 Leon. 16. 1 Sand. 142. So, we have seen, limitations which operate so as to determine the preceding particular estate, before its regular determination, may be effected by a species of limitation, which is not properly a remainder, nor condition, but which is distinguished by the name of a conditional limitation. Ante, 214 b. p. 87. 4 Reev. 509, 510. Plowd. 27. 32. 34. 414. Dougl. 727. n. 1. Shep. Touch. 150. With respect to the distinction between shifting uses and conditional limitations, see 1 Sand. 142—145. Where an estate-tail is limited, and a secondary or shifting use is limited upon it, the tenant in tail may by recovery bar the limitations over. *Page v. Hayward*, 2 Salk. 570. 1 Lev. 35. 1 Sid. 102. Fearn. Cont. Rem. 15, 16. And it is observable, that when an estate in fee-simple is granted or devised, with a shifting use or secondary fee limited upon it, this secondary or shifting use must be expressly limited to take effect within the compass of a life or lives in being, and twenty-one years, and (in the case of a posthumous child) a few months over, Ante, 20 a. vol. 1. p. 515. n. (7). 22 Vin. Abr. 252. pl. 4: but it is otherwise where the limitation of the use, in the first instance, is in tail. And the reason of the difference is this;—in the former case, as these kinds of shifting uses are not barrable by recovery, they would tend to a perpetuity; whereas, in the latter case, there is no danger of a perpetuity, because when the first tenant in tail comes into possession, he may bar it by a common recovery. See 1 Sand. 147. *Nichols v. Sheffield*, 2 Bro. C. C. 215. *Doe v. Henage*, 4 T. R. 13. Besides such shifting or springing uses as take effect, or arise, upon an event provided for by the deed, in which the original limitations, intended to be defeated thereby, are created; there is also a species of shifting or future use, which arises from the act of some agent or person nominated in the deed; and this is called a use, arising from the execution of a power. Every power of this kind is a power of revocation, and new appointment; for the new uses and estates created under the appointment, must necessarily (as to the extent of such appointment) revoke, defeat, or abridge the uses which existed, and were executed, previously to the new limitation. 2 Vern. 511. Moor. 611. And therefore it is not necessary (though sometimes done) to limit an express power of revocation prior to the power of appointing new uses. 1 Sand. 148. Powers of appointment are adopted under various circumstances, and they may either by the express provision of the deed precede, or be reserved after the limitation of uses intended to be executed subject to such powers. Thus an estate may be conveyed to I. S. and his heirs, to such uses as A. shall appoint, and in default of appointment, and subject thereto, to the use of A. and his heirs. And it is immaterial whether the power actually precedes, or comes after the limitation of the use to A. and his heirs. 4 T. R. 181. 1 Sand. 149. But a power of revocation and new appointment cannot be reserved upon a legal estate at the common law. Ante, 237 a. p. 123, 124. 1 Sand. 149. Sug. Pow. 121. In most modern marriage settlements, powers of selling and exchanging are limited to the releasees; and powers of leasing, jointuring, and limiting terms for raising portions for younger children, are reserved to the tenants for lives. All these powers, by whatever words they are created, take effect by way of limitation of use out of the original seisin of the feoffees or releasees. 1 Sand. 155. As to the priority of the several powers contained in a settlement, where it is not provided for by the instrument itself (which is usually done), see 1 Sand. 158—162. Sug. Pow. 334—337. See further as to powers, ante, p. 125. n. (q 3), p. 434. n. (o 1), p. 449. n. (e), p. 458. n. (L). With respect to the different kinds of conveyances derived from the statute of Uses, see n. (s)

owner of the land, by bargain and sale by deed indented and inrolled, or by covenant upon lawful consideration, whereof you may read plentifully in my Reports (b).

veyances
uses may be
raised.
Dillon &
Frayn's case,
lib. i. &c. c. 13.

infra; and as to uses and trusts which are not executed by the statute, see the note at the end of this chapter.—[Ed.]

(b) In order to raise a use by the statute, there must be either a direct or actual conveyance, operating by way of transmutation of possession, or a contract or covenant, operating as a bargain and sale, or a covenant to stand seised to uses: for contracts and agreements which are merely referable to subsequent conveyances, do not raise uses under the statute. See *Hore v. Dix*, 1 Sid. 25. *Pelfield v. Pearce*, 2 Rol. Abr. 789. *Bainton's case*, 96 a. Shep. Touch. 82. *Wingfield v. Littleton*, Dy. 162 a. *Audley's case*, Ibid. 166 a. *Trevor v. Trevor*, 1 P. Wms. 622. 1 Eq. Ab. 38. *Edwards v. Freeman*, 2 P. Wms. 436. 439. 447. The same rule seems to prevail where the covenant is merely executory, and upon which an action of covenant is the proper remedy, in case the covenant is not performed. *Blitheman v. Blitheman*, Cro. Eliz. 279. Benl. 121. pl. 153. Moor. 122. pl. 269. *Buckler v. Symons*, 2 Rol. Abr. 788. Et vid. *Holloway v. Pollard*, Moor. 761. 1 Sand. 107—111.

The conveyances under the statute of uses are, 1st. A bargain and sale; which operates without any transmutation of possession, and is defined to be a contract by which a person conveys his lands to another for a pecuniary consideration; in consequence of which, a use arises to the bargainee, and the statute immediately transfers the legal estate and possession to the bargainee, without any entry or other act on his part. 2 Inst. 671. Ante, p. 461. n. (q). The proper and technical words of this conveyance are bargain and sell; but they are by no means necessary, nor material to its operation. For if a man for a pecuniary consideration, by deed indented, covenant to stand seised to the use of another person (8 Co. 94 a. 7 Co. 40. 1 Vent. 138.). or give and enfeof (3 Leon. 16.), or alien, grant, and demise to him, 8 Co. 49 a. *Taylor v. Vale*, Cro. Eliz. 166; such deed, if properly inrolled, will operate as a bargain and sale. 2 Sand. 48. In every bargain and sale there must be a use, and a seisin to serve it; and therefore a person incapable of standing seised to a use, cannot transfer lands by this conveyance. See Gilb. Uses, 285. Cro. Jac. 50. Supra, n. (A), p. 571. 573. All corporeal hereditaments, of which the bargainor has a seisin, and all incorporeal hereditaments in actual existence, may be conveyed by this conveyance; because they may be limited to uses. *Taylor v. Vale*, supra. *Beaudely v. Brook*, Cro. Jac. 189. Supra, p. 571. 573. n. (A). So a trust declared upon a legal estate, and an equity of redemption, may be transferred by bargain and sale. *Oldin v. Samborn*, 2 Atk. 15. Et vid. *Shrapnell v. Vernon*, 2 Bro. C. C. 268. 272. A man seised in fee may convey by bargain and sale for a term of years; but no chattel interest already created can be transferred by bargain and sale, Gilb. Uses, 286; because the owner of a chattel interest has no seisin out of which a use can arise. Poph. 76. 1 Sand. 210. Idem, vol. 2. p. 51. 4 Cru. Dig. 178. A pecuniary, or rather valuable, consideration, is necessary to the validity of this conveyance, 1 Co. 176 a. 1 Freem. 249. 23 Vin. 205. 2 Prest. Conv. 373; but this may be a trifling one, as the payment of 5s., or the reservation of a rent of 12d. 2 Rol. Abr. 787, 788. 10 Co. 34 a. The actual sum paid by the bargainee, need not be stated, if the conveyance be expressed to be made in consideration of a certain (2 Rol. Abr. 786.) or competent sum, *Fisher v. Smith*, Moor. 570; neither is there a necessity that the money should be paid upon the execution of the bargain and sale, see 1 Leon. 6. *Dyer*, 337 a. pl. 34; nor is it absolutely necessary that the consideration should be mentioned in the deed, as an averment of a consideration which is consistent with the deed is admissible in evidence. *Willes*, 677. Ante, p. 9. 10. n. (x). But if the consideration of money be expressed in the deed, no averment will lie that it was not actually paid. *Clarkson v. Hanway*, 2 P. Wms. 204. When the statute of Uses was made, it was foreseen, that all lands would thenceforth be conveyed by bargain and sale, being a conveyance of a private nature. To prevent this, it was enacted in the same session of parliament by stat. 27 H. 8. c. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by deed indented (see 3 Leon. 16, 17.), and inrolled, in parchment (2 Inst. 673. *Dyer*, 218.), within six lunar months (2 Inst. 674. Shep. Touch. 223,) from the date (if the deed have a date, or if not, then from the delivery, Ibid. Hob. 140.), in one of the courts of record at Westminster, or with the custos rotulorum of the county, where the lands lie. 2 Inst. 671. Gilb. Uses, 90. The inrolment may be made either upon the day of the date (2 Inst. 674.), or upon the last day of the six months, reckoning the day of the date exclusively. *Thomas v. Popham*, *Dyer*, 218. In consequence of the statute of Inrolments, the freehold does not pass from the bargainor until the deed of bargain and sale is duly inrolled; but the inrolment

(579)* * Here is to be observed the intendment of law, that when a feoffment is made to a future use or to the performance* of his last will, (580)*

On feoffment to future uses, the use results to the feoffor in the mean time.

35 H. 6. Subpœna, 22. 15 H. 7. 12 b. 37 H. 6. 36. 11 H. 4. 62. 7 H. 4. 22. 1 Mar. 111.

Dyer, (6 Rep. 18 a.) (Post, 111 b. 112 a.) (2 Rep. 58.)

has, for most purposes, a relation to the delivery of the deed, 2 Inst. 674: and thereby avoids all mesne incumbrances and conveyances made by the bargainer between the date, or delivery, and the inrolment. *Mullery v. Jennings*, 2 Inst. 674. *Flower v. Baldwin*, Cro. Car. 217. Neither the death of the bargainer or bargainee before inrolment, will prevent the passing of the estate. And, where the bargainee dies before inrolment, his heir shall be in by descent, 2 Inst. 674. *Dymock's case*, Cro. Jac. 408. Hob. 136; and his wife shall have dower, in case the deed be afterwards inrolled. Cro. Car. 217. 2 Sand. 55. Et vid. ante, 186 a. vol. 1. p. 734. Ow. 70. 2 Bulst. 89. The bargainee of a reversion shall have the rent incurred between the delivery and inrolment of the deed, Latch. 157. 1 Sid. 310: but if the rent be paid by the tenant to the bargainer, the payment is lawful, and the bargainer is not compellable at law to account for it. Ow. 150. 69. Dyer, 218. Godb. 156. So if a bargainee grant a rent before inrolment, it is a good grant, if the deed be afterwards inrolled. Cro. Car. 217. A bargainee before inrolment may be a good tenant to the præcipe for suffering a recovery, 2 Inst. 675. Ow. 70; and he may receive a release from a stranger, 2 Inst. 675; but it is said, that if a bargain and sale be made to A. and B. and their heirs, and A. release to B. before inrolment, such release is void. Shep. Touch. 227. So if a disseisor bargain and sell the lands, and the disseisee release to the bargainee before inrolment, the release is inoperative, 1 Rol. Rep. 425; but a release to the bargainer will, in such case, ensure for the benefit of the bargainee. *Mockett's case*, Shep. Touch. 227. But if a bargainee before inrolment convey the estate by bargain and sale to another person, and then inrol the first deed, the second bargain and sale is void, though it should afterwards be inrolled. *Sir Robert Barker's case*, Shep. Touch. 227. *Bellingham v. Alsop*, Cro. Jac. 52, 409. *Perry v. Bowes*, 1 Vent. 360. T. Jo. 169. So a lease made by a bargainee before inrolment is not valid. Cro. Car. 110. Carth. 178. 2 Sand. 56. Though the inrolment has relation to the delivery of the deed to avoid all mesne incumbrances and conveyances made by the bargainer; yet it does not divest any estate lawfully settled in the bargainee in the interim. *Hynd's case*, 4 Co. 71 a.; therefore if a feoffment be made, or fine levied by the bargainer to the bargainee before inrolment, he shall take by the feoffment or fine, and not by the bargain and sale. But if, in a case of this kind, the bargainer incumbers the land between the execution of the bargain and sale, and the levying the fine, &c. then the inrolment shall have relation back for the avoiding such mesne incumbrances in favour of the bargainee. 2 Inst. 671, 672. Shep. Touch. 226. *Northumberland's case*, Moor. 337. *Popham's case*, 4 Leon. 4. *Flower v. Baldwin*, Cro. Car. 217. 4 Cru. Dig. 184. By the stat. 10 Ann. c. 18. s. 3. it is enacted, that a copy of the inrolment of a bargain and sale, examined with the inrolment, and signed by the proper officer, and proved upon oath to be a true copy, so examined and signed, shall in all cases be of the same force and effect as the indenture of bargain and sale would be, if the same was produced. The words of the statute of Inrolments, 27 H. 8. only extend to estates of inheritance or freehold; and, therefore, a bargain and sale of lands for a term of years need not be inrolled. 2 Inst. 671. And there is a proviso in the act, that it shall not extend to hereditaments lying within any city, borough, or town corporate, wherein the mayors, recorders, or other officers, have authority to inrol deeds. See *Chilborne's case*, Dyer, 229. *Darby v. Bois*, Yelv. 123.

2d. A covenant to stand seised to uses; which is also a conveyance operating without transmutation of possession, by which a man, seised of lands, covenants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee. Here the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put immediately into corporeal possession of the land, without ever seeing it, by a kind of parliamentary magic. 2 Bl. Com. 338. 7 Co. 40 b. 2 Inst. 672. The consideration of this conveyance is the foundation of it; and therefore the words *covenant to stand seised* are not absolutely necessary, but any other words, such as grant, bargain and sell, or assign, will create a covenant to stand seised, if it appears to have been the intention of the party to use them for that purpose. *Crossing v. Scudamore*, 1 Vent. 137. *Lade v. Baker and Marsh*, 2 Vent. 150. *Doe d. Milburn v. Spaldeld*, Willes, 673. *Doe v. Simpson*, 2 Wils. 22. A covenant to stand seised being, however, a conveyance of a private nature, and valid without inrolment, it is

the *feoffees shall be seised to the use of the feoffor and of his heirs *271 b. in the mean time.

Ipsæ etenim leges cupiunt ut jure regantur.

absolutely necessary that the consideration be either affection to a near relative, or marriage. *Sharrington v. Stratton*, Plowd. 300. *Bould v. Winstan*, 2 Rol. Abr. 786. But if the consideration appear, it will be sufficient, though it be not particularly expressed; as if a man covenant to stand seised to the use of his wife, son, or cousin, without saying in consideration of the natural love which he bears towards them, yet the covenant will raise the use. *Bedell's case*, 7 Co. 40. 2 Wils. 22. 2 Rol. Abr. 784. As to the considerations of friendship, long acquaintance, of being school-fellows, affection to a natural son, and that the king is head of the commonwealth; they will not raise uses by way of covenant to stand seised. See Plowd. 302. 2 Rol. Abr. 783. 2 Co. 15 a. b. 2 Sand. 82. Ante, 123. vol. 1. p. 147. n. (8). And, though in the case of a covenant to stand seised, a use will arise to those who are within the consideration, no use will arise to those who are strangers to it. *Page's case*, 1 Co. 154 a. *Wisemay's case*, 2 Co. 15 a. *Smith v. Risley*, Cro. Car. 529. *Whaley v. Tancred*, 2 Lev. 52. 54. A covenant to stand seised being similar, in many respects, to a bargain and sale, it follows that no person can transfer lands by this mode of conveyance, who cannot be seised to a use: nor can any species of property be transferred by covenant to stand seised, which cannot be conveyed to a use. 4 Cru. Dig. 187. And in order to render this conveyance effectual, the covenantor should have a vested estate in possession, reversion, or remainder. Therefore a covenant to stand seised of land, which the covenantor shall afterwards purchase, is void. Moor. 342. Cro. Eliz. 401. 2 Rol. Abr. 790. pl. 8. Ibid. pl. 9. In the case of a covenant to stand seised, the estate continues in the covenantor until a lawful use arises. 1 Co. 154 a. It is also observable, that a bargain and sale, and covenant to stand seised, pass no interest but that which the bargainor or covenantor can lawfully transfer: and therefore when either of these conveyances is made by a tenant in tail, it cannot produce a discontinuance, *Seymour's case*, 10 Co. 95. 1 Atk. 2; and when made by a tenant for life, it will not create a forfeiture; neither will it destroy contingent remainders depending upon such life-estate. 2 Sand. 83. 4 Cru. Dig. 193. Gilb. Uses, 140. And as these conveyances only pass a use, and the legal estate and possession is transferred by the statute, and as no use can be limited to arise out of a use, ante, p. 573. n. (A), 2 Prest. Conv. 482; it follows, that a use cannot be limited upon the legal estate of the bargainee or covenantee, so as to be executed by the statute; but the second use will be a mere trust. See *Tyrrell's case*, Dyer, 155 a. 1 And. 37. 1 Leon. 148. 2 Prest. Conv. 482, 483. 1 Prest. Abstr. 307. That a rent may be reserved on a covenant to stand seised, see *Rivett's v. God-on*, W. Jo. 179.

3d. A lease and release; which is a conveyance operating by transmutation of possession, and usually classed under those which derive their effect from the statute of Uses, but of which only one part is derived from that statute, and the other part from the principles of the common law. Though it is called a lease and release, it is in fact a bargain and sale for a year, and a common law release, operating by way of enlargement; and owes its rise to the following circumstances. The framers of the statute of Uses foresaw, that freehold estates would thenceforth become transferable by parol only, without any form or ceremony whatever. A clause was therefore inserted in that statute, by which all bargains and sales of freehold estates, were required to be made by writing, indented and inrolled. This provision, which, if it had not been evaded, would have introduced an almost universal register of conveyances of the freehold, in the case of corporeal hereditaments, was soon defeated by the omission to extend the statute to bargains and sales for terms of years. 4 Cru. Dig. 195, 196. In the times of Hen. 6. and Edw. 4. it was not unusual to execute a lease for two or three years, completed by the actual entry of the lessee, for the express purpose of enabling him to receive a release of the inheritance; and which was accordingly made to him within a short time afterwards. The lease and release, executed in this manner, transferred the freehold of the releasor as effectually as if it had been conveyed by fine or feoffment. 3 Ree. Hist. 357. When it was observed that the statute of Uses transferred the actual possession without entry, the idea of a lease and release was adopted. A bargain and sale for a year was made by the tenant of the freehold to the person to whom the lands were intended to be released. This bargain and sale (which does not require inrolment, 2 Co. 36 a. 8 Co. 94 a.), in consequence of the consideration, makes the bargainor stand seised to the use of the bargainee; and then the use of the term for a year being

(581)* *And the reason would that seeing the feoffment is made without
(582)* consideration, and the feoffer hath not disposed of the *profits in the

(1 Rol. Abr.
880. Sid. 458.

vested in the bargainee, the statute of Uses immediately transfers the possession, and vests the legal estate in the bargainee; and it is now clearly settled that the estate, vested in the bargainee upon the execution of the deed is capable of receiving a release of the reversion before or without an *actual entry* by him. Cro. Car. 110. Cro. Jac. 604. Cart. 66. A release generally dated the day after the bargain and sale, is accordingly made; and thus an estate of freehold is transferred without entry, inrolment, or livery of seisin. 2 Sand. 62. 4 Reeve. Hist. 352. This conveyance which has almost superseded that by feoffment, is said to have been invented by Serjeant Moore, at the request of the Lord Norris, to the end that some of his kindred or near relations should not take notice by any search of public records what conveyance or settlement he should make of his estate. Fabian Phelps Treat. on the writ of Capias, 19 b. *Barker v. Keale*, 2 Mod. 252. 4 Reeve. Hist. 335. 4 Cru. Dig. 196. 2 Bl. Com. 339. Regularly the lease should be dated on one day, and the release be dated on the next succeeding day; both these instruments however may be dated on the same day, see *Ld. Raym.* 276; and they may be, and generally are, executed in the same instant of time. In correct practice the execution of the lease for a year ought to precede the execution of the release; but even though it should be proved that the release was executed before the lease, the court, in applying the rule which makes these two instruments parts of the same assurance, would, probably, support a title derived under these instruments. 2 Prest. Conv. 241. 363. 386. It is certain, however, that in the absence of evidence of the fact, the law would presume the priority in the execution of the lease, as the means of giving effect to the release. *Taylor v. Horde*, 1 Burr. 106, 107. It has been determined, that the recital of a lease for years, in a deed of release, is good evidence of such lease against the releasor, and all those who claim under him, but not as to others, without proving that there was such a deed, and that it was lost or destroyed. See 6 Mod. 44. 2 Lev. 108. With respect to the persons who may convey by this assurance, it is observable, that when the release is founded upon a bargain and sale for a year, it is necessary that the person making the conveyance should be capable of standing seised to a use. Where the releasor is incapable of standing seised to a use, then the estate for a year should be created by a lease at common law, with an actual entry by the lessee. 2 Sand. 63. Every species of property, which is capable of being conveyed to uses, may be conveyed by lease and release; and it is now clearly established, that estates in remainder or reversion, expectant on estates for life or for years may be conveyed by lease and release. 2 Cas. & Op. 144. 2 Prest. Conv. 244. Ante, p. 502. n. (x 3). The conveyance by lease and release does not divest any estate, nor create a discontinuance or forfeiture, post. Sect. 598. Sect. 600. Sect. 606; neither can it destroy contingent remainders. Fearn. Cont. Rem. 4th ed. 473. With respect to resulting uses, it is observable, that when the release is to a man and his heirs, the releasee will be seised under the rules of the common law, since he has the seisin at the common law, and the use gives him nothing more or less than he had before. Bac. 63. 2 Cas. & Op. 281. 289. But if a particular estate be limited to the use of the releasee either for life or in tail, or if the use be declared to any other person or persons, then the use is executed by the statute. Cro. Car. 230. Bac. 64. It has been doubted, whether, in case of an omission of a declaration of the use in the release, the use will result to the releasor, or whether it will remain in the releasee, even though there be no consideration, except a nominal one of five shillings. In *Shorbridge v. Lamplugh*, 2 Salk. 678, the decision was against the resulting use; but Lord Ch. J. Holt admitted, that there might be a resulting use on a release. It is clear, that if the release be made for a valuable consideration, or for any purpose which requires that the seisin should remain in the releasee, as to the intent that a common recovery should be suffered; there would not be any resulting use. And in all cases a resulting use may be rebutted by internal or external evidence, which shows that the releasee was to be the beneficial owner. 2 Prest. Conv. 486. Et vid. Bro. Feoff. al. Uses, p. 10. Perk. sect. 535. Dyer, 146. So no use will result on a grant of an estate in tail, for life, or years; for every gift of a particular estate implies a consideration, as it creates a service. 1 Cru. Dig. 454. And if the grantee of a particular estate assign his estate, no use will result to him at law: but circumstances may induce a court of equity to declare that there is a resulting trust. *Cash v. Dod*, Cro. Jac. 200. So, as a will implies a gift, no use will result on a devise, Bro. Feoff. al. Uses, p. 10: though an express use may be declared on the gift of a particular estate, or on a devise. 2 Prest. Conv. 487. 1 Cru. Dig. 456. If, however, particular uses

mean time, that by construction and intendment of law the feoffor ought to occupy the same in the mean time.

Dyer, 136 a.)
35 H. 6. Sub-
penna. 22. 30
H. 6. tit. De-
vice.

are declared, and the fee is left undisposed of, the fee will result to the grantor. Ante, 23 a. p. 143. 2 Ld. Raym. 802. So if the use of the fee be limited to the former owner, he will be in of his old use, that is, of a new estate, and not the old estate; but this new estate will be descendible in the same manner as the old estate was descendible, and is in law treated as the *old use*. Ibid. But if the grantor takes a particular estate for life, or in fee-tail, or if he takes a fee differently modified, as an estate to him and his heirs till marriage, or a fee liable to be defeated by a shifting use; this will be an estate of which he will be considered as the purchasing ancestor, and it will be descendible though a fee, without regard to the descendible quality of the old use. 2 Prest. Conv. 487.

4th. Declarations of uses.—The conveyances by bargain and sale, and covenant to stand seised, are in fact nothing more than declarations of uses; for the use being served out of the seisin of the bargainor and covenantor in those conveyances, they merely serve to declare the use to the bargainee and covenantee. But upon such conveyances as operate by way of transmutation of possession, as a feoffment, fine, or recovery, whereby the legal seisin and estate are vested in the feoffee, cognizee, or recoveror, a use may be declared in favour of a third person, by a deed or writing distinct from the conveyance, by which the possession is transferred, and such use will immediately arise to such third person out of the seisin of the feoffee, cognizee, or recoveror; and the statute will transfer the actual possession to such use, without any entry or claim. The deeds by which the uses of fines and recoveries are declared (for upon the conveyances by feoffment and lease and release, it is now universally the practice to declare the use in the same deed immediately after the *habendum*) derive their effect from the statute of Uses, and are called declarations of uses. Where they are executed previous to the levying a fine, or suffering a recovery, they are called deeds to *lead* the uses: but if executed subsequent to a fine or recovery, they are then called deeds to *declare* the uses of them. 4 Cru. Dig. 206. After the stat. 27 H. 8 c. 10. it became a question, whether if a recovery were suffered, or fine levied, without any previous declaration of the uses, any subsequent deed could direct them? For it was thought, that upon suffering the recovery or levying the fine, the use resulted to the recoveree or conusor, which resulting use the statute immediately executed; so that the use being once vested and executed by the statute, it could not be defeated by any subsequent declaration. However, in *Dowman's case*, (9 Co. 7 b. 28 Eliz. Et vid. *Bessett's case*, Dyer, 136 a.) it was determined, that although the use resulted to the recoveree or conusor until the subsequent declaration, yet, when that was made, the use was immediately executed according to the declaration. Soon after the stat. 29 Car. 2. c. 3. s. 7, which directs, that all creations and declarations of uses shall be in writing, it again became a doubt, whether resulting uses upon fines and recoveries were not so executed as to exclude any subsequent deed, see Gilb. Uses, 62; for it was supposed, that the statute required the use to be declared either previously to, or at the time of, levying such fines and recoveries. Therefore by the stat. 4 Ann. c. 16. s. 15, declarations of the uses of fines and recoveries, manifested by any deed, made by the party, after the levying of such fines, or suffering such recoveries, shall be as effectual as if the 29 Car. 2. c. 3. had not been made. 1 Sand. 174, 175. It is observable, that though the word "deed" is used in the 4 Ann. c. 16. instead of writing, yet the statute does not repeal the clause alluded to in the statute of Frauds; it is only explanatory of it, and if taken literally, can only be extended to declarations of uses made subsequent to a fine or recovery, and not to those made prior. And the clause in the statute of Frauds, which requires that declarations of uses, trust, and confidence, should be in writing, extends, in the case of fines, to third persons only, and not to the cognizors and cognizees of the fine; for the resulting use to the cognizors may be rebutted in favour of the cognizees, by parol evidence, showing such to have been the intention of the parties. Dougl. 25. 4 Cru. Dig. 210. No technical words are necessary in a declaration of uses; whenever the intention of the parties can be collected in the limitation of the uses of a fine or recovery upon any expression in a precedent or subsequent declaration or conveyance, such declaration or expression is sufficient to declare the uses of the fine or recovery. 3 P. Wms. 208. 1 Ld. Raym. 290. 12 Mod. 162. The declaration of the uses, however, must be certain, and that especially in three things, in the person to whom, the lands, &c. of which, and in the estates, by which the uses are declared; and if there want certainty in either of these, the declaration is not good; and it must be complete in itself without any reference to indentures or other writings to be made afterwards, for then it is but an imperfect communi-

- (583)* *And so it is when the feoffor disposeth the profits for a particular
 (584)* time *in present*; the use of the inheritance shall *be to the feoffor
 (585)* and his heirs, as a thing not disposed of; wherein it is to be observ-
 ed, that lands and tenements conveyed* upon confidences, uses, and

So where the
 feoffor dis-
 poses of the
 profits for a

cation, and no complete declaration. *Shep. Touch.* 6th ed. 519. But it is not necessary, that there should be a consideration expressed in a deed to lead or declare the uses of a fine or recovery; though, we have seen, that in the case of a bargain and sale, or covenant to stand seised, a consideration is absolutely necessary. *Supra.* p. 579, 580. *Et vid. ante*, 123 a. vol. 1. p. 147 n. (8). 1 *Ld. Raym.* 290. With respect to the cases in which the first declaration shall be controlled by the second, it is observable, that if there be a deed leading the uses of a fine or recovery, those uses may be altered, varied, or absolutely revoked, previously to the levying the fine or suffering the recovery. When the fine or recovery is conformable in time, persons, and other circumstances with the deed leading the uses of it, then the variation, alteration, or revocation of the uses may be effected; 1st. By a deed or other instrument of as high nature, as the preceding deed or instrument: but in this case a deed leading the uses of a fine or recovery cannot be varied by a mere writing without seal. *Countess of Rutland's case*, 5 Co. 26 a. 2dly. By the mutual consent of all parties concerned in interest: such consent, however, must be expressed by matter equally solemn with that declaring the former uses. See *Shep. Touch.* 519. *Stapilton v. Stapilton*, 1 Atk. 2. 1 *Sand.* 182, 183. 4 *Cru. Dig.* 216. 2 *Prest. Conv.* 45, 46. But where there is a deed leading the uses of a fine or recovery to be subsequently levied or suffered, and the fine or recovery varies from the preceding deed in time, persons, or other circumstance, then the uses of the first deed may, previously to the fine or recovery, be varied by another instrument, although such subsequent instrument be not a deed, but merely a writing without seal, *Jones v. Morley*, 2 *Salk.* 677; and although all the persons interested under the first declaration are not parties to the second, *Countess of Rutland's case*, 5 Co. 25 b.: and the uses of the first deed may, after levying the fine or suffering the recovery, be varied, *Jones v. Morley*, *supra.* *Shep. Touch.* 520; though, in this case, if the doubt suggested by the 4 *Ann. c.* 16. s. 15. be sufficiently grounded, (See *Sagd. Gilb. Uses*, 111. n.) a deed will be necessary. 1 *Sand.* 187—189. When, however, the fine, or recovery, does not vary in circumstances from the deed leading the uses of it, no subsequent declaration is admitted to control the operation of the previous deed or instrument. *Shep. Touch.* 520. *Salk.* 676. *Tregame v. Fletcher*, 9 Co. 10 b. 11 a. *Comb.* 429. 1 *Atk.* 9. 2 *Prest. Conv.* 42. And although the fine, or recovery, does not altogether correspond in circumstances with the deed or instrument leading the uses of it, yet if there be no subsequent declaration of the uses, the fine or recovery shall still enure to the uses of the leading deed or instrument. *Shep. Touch.* 520. 2 Co. 76 a. *Haverhill v. Hare*, 2 *Roll. Abr.* 799. 1 *Atk.* 7. 13 *Vin.* 30 b. pl. 6. pa. 2. Where there is no preceding limitation of the use, the uses of the fine or recovery may be subsequently declared, according to the 4 *Ann. c.* 16. s. 15. by deed; but it is by no means certain, that such subsequent declaration may not be controlled by another averment by deed, although there be no variance in the fine or recovery. See *Tregame v. Fletcher*, 2 *Salk.* 676. *Shep. Touch.* 521. *Vavisor's case*, *Dyer*, 307 b. 1 *Sand.* 190. In the case of two contradictory declarations in the same instrument, the rule is, that the first declaration shall prevail, and the second be void. *Southcoat v. Manory*, *Cro. Eliz.* 744. 8. C. Moor. 680. nom. *Wilmot v. Knowles*. It is now the usual practice, where a fine is intended to be levied to uses, to execute a deed previous to the fine, in which the intended cognizor covenants to levy a fine, and a declaration is inserted in the deed, of the uses to which the fine, when levied, shall enure. And where a recovery is intended to be suffered, a deed is executed to make a tenant to the præcipe with an agreement to suffer a recovery, and a declaration of the uses of the recovery is inserted in the deed. 4 *Cru. Dig.* 220. With respect to the persons who may declare or limit uses, not only all those to whom the law, in other instances, gives a disposing power, are capable of declaring uses, but also some persons who are incapacitated from conveying away their estates by any other kind of assurance. Thus the king may declare uses upon his letters patent, though indeed the patent of itself implies a use. *Bac. Uses*, 66. The queen may also declare uses. *Ibid.* So infants, idiots, or persons of nonsane memory, may declare uses upon a fine or recovery; which declaration of uses will continue valid as long as the conveyance, upon which the uses are declared, remains of force. *Beckwith's case*, 2 Co. 58 a. *Lewing's case*, 10 Co. 42 b. *Mansfield's case*, 1 Co. 124. *Bac. Uses*, 67. But in cases of this kind the court of chancery will interfere. See 2 *Ves.* 403. 2 *Atk.* 313. 13 *Vin.* 305. pl. 3. n. (M a.)

trusts, are to be ruled and decided, if question groweth upon the confidences, uses, or *trusts, by the judges of the law ; for that it appeareth by section 463. and the next section, they are within the intentment and construction of the laws of the realm (1).

particular time in present, the use of the inheritance is in him, as a thing undisposed of.
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4 Cru. Dig. 226. 1 Prest. Abstr. 325. And it has been determined, that an agreement entered into by an infant, to levy a fine, and suffer a recovery, when he came of age, to certain uses, will not operate as a declaration of the uses of such fine or recovery. *Nightingale v. Ferres*, 3 P. Wms. 207. *Frost v. Wolverton*, 1 Stra. 94. As a married woman is allowed to join with her husband in levying a fine or suffering a recovery, and to bind herself by those assurances, she is also allowed to join with her husband in declaring the uses of such fine or recovery. If the husband, in such case, alone declares the uses, his declaration will bind the feme, (although an infant, 2 Rol. Abr. 798. 22 Vin. 232. pl. 2.) unless her dissent appears; for as she joined with her husband in the fine or recovery, it shall be presumed that she agreed with him in the declaration of uses, unless the contrary is proved. *Beckwith's case*, 2 Co. 57 a. *Lusher v. Banbong*, Dy. 290 a. *Harrington's case*, Ow. 6. And if she acquiesce for any length of time after her husband's death in the declaration of uses made by him, she will be bound by the fine or recovery. *Swanton v. Raven*, 3 Atk. 105. The wife alone cannot declare the uses of a fine, levied by her and her husband, of her land, because being *sub potestate viri*, she cannot limit the use without the concurrence of her husband; on the other side, the husband, who has no estate in his own right, cannot declare the uses of such a fine, without the express or implied concurrence of the wife; so that the one is not *sui juris*, although she has the estate, and the other is *sui juris*, but has not the estate: hence it follows, that when they make different declarations, such declarations are both void. *Beckwith's case*, 2 Co. 57 b. But if the husband and wife agree in the declaration of the uses of part of the land, and vary in the declaration of the residue, it will be good for the part in which they agree, and void for the residue. *Ibid.* 58 a. *Gilb. Uses*, 216. The right to declare uses is coextensive with the estate or interest which each of the parties has in the lands. Therefore, if a tenant for life, and the remainder-man or reversioner, join in levying a fine or suffering a recovery, they may declare the uses according to their respective estates in the land. 2 Co. 57 b. So joint-tenants may each declare different uses of their respective shares. 2 Co. 58 a. 22 Vin. 236. pl. 1. *Palm.* 405. But where a fine was levied by tenant for life, remainder-man in tail, and reversioner in fee, it was held, that a declaration of uses by the tenant for life, and remainder-man in tail, did not bind the reversioner. *Roe v. Popham*, Dougl. 24. *Argol v. Cheney*, 22 Vin. (T. 6.) 236. pl. 1. We have seen, that uses may be declared on a lease and release as well as on a fine or recovery, *supra*, p. 583. 2 Cas. & Op. 239; but it should be observed, that no person can declare the uses of a release, who is not capable of transferring lands by that conveyance; and therefore a declaration of the uses of a release by a married woman (*Gilb. Uses*, 244), or an infant, would be void. 4 Cru. Dig. 227. *Ante*, vol. 1. p. 177. n. (41).

5th. Appointments.—The nature and general doctrine of powers of revocation and appointment, have been already explained, *ante*, p. 124. n. (q 3), and p. 578. n. (A); but it may be here observed, that these powers may be inserted in all conveyances which derive their effect from the statute of Uses; and, when executed, the uses originally declared cease, and new uses immediately arise out of the seisin of the cognizees, recoverors, or releasees, to the person named in the appointment; and the statute transfers the legal estate to the appointees, who, by that means, acquire the legal estate and possession. The powers usually reserved in settlements of leasing, jointuring, selling, exchanging, and charging, though not usually called so, are in fact powers of revocation, for they operate as revocations *pro tanto*, of the preceding estates. 4 Cru. Dig. 229. *Supra*, p. 578. n. (A). Powers are in general only inserted in conveyances which operate by transmutation of possession, that is, in declarations of uses of fines and recoveries, or in releases. 4 Cru. Dig. 231. *Sugd. Pow.* 117. By what words they may be created, see *ante*, p. 124. n. (q 3).

The doctrine of powers may be further considered, 1st. With respect to the persons to whom powers may be given.—Powers of revocation and appointment may not only be reserved to all those who are capable of disposing of lands and tenements, but also to some persons who have not by the common law a disposing power: for whenever a person to whom a power is given, executes it, the appointee under the power does not derive any interest from the person executing the power, he being considered as a mere instrument, to

(1) See Mr. Butler's note at the end of the volume, note IX.

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279 a.
By statute 27
H. 8. all uses
are transferred
into possession.

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(589)*

(a) 27 H. 8.
cap. 10. (Dr. & Stud. 98 a.)

But since Littleton wrote, all uses are transferred by act of parliament (a) into possession, so as the case which Littleton (Sect. 462, 463,) puts, is thereby altogether altered; yet it is necessary to be known, what the common law was before *the making of the statute, and may serve for the knowledge of the law in like case.

carry into execution the intent of the person who created the power; but is in immediately by and under the instrument by which the power was created. By the common law a married woman cannot dispose of her own estate without a fine or recovery; but as the instrument, or attorney of another, she may convey an estate in the same manner as her principal could, because the conveyance is considered as the deed of the principal, and not of the attorney, and her interest is not affected. Upon the same principle it has been determined, that a married woman may execute a power, whether appendant, in gross, or simply collateral (*Harris v. Graham*, 1 Rol. Abr. 329. pl. 12. 2 Rol. Abr. 247. pl. 6. *Gibbons v. Moulton*, Finch. 346. *Daniel v. Uply*, Latch. 39. Godb. 327. pl. 419. *Bayley v. Warburton*, Com. Rep. 494. *Tomlinson v. Dighton*, 1 P. Wms. 149. *Travel v. Travel*, 3 Atk. 711. 2 Ves. 191, and as well over a copyhold as a freehold estate. *Driver v. Thompson*, 4 Taunt. 294. It is not material whether the power is given to an unmarried woman, who afterwards marries, *Gibbons v. Moulton*, supra; or to a woman while she is married, who afterwards takes another husband, *Bayley v. Warburton*, supra. *Barnet v. Mann*, 1 Ves. 157: in both cases she may execute the power, and the concurrence of her husband is in no case essential. Sugd. Pow. 150. Ante, vol. 1. p. 132. n. (n). But a power given to a woman being *not*, cannot be executed by her during her coverture. *Lord Antrim v. Duke of Buckingham*, 1 Ab. Eq. 343. 1 Ch. Ca. 17. 2 Freem. 168. It is now usually inserted in the deed by which the power is created, that a woman shall be enabled to execute it, whether she be sole or married. The proper mode of creating a power of this kind, is to convey the lands to trustees, to the separate use of the wife, remainder to such persons, and for such estates, as she shall by any deed or writing under her hand, notwithstanding her coverture, direct or appoint: but although no such conveyance be made, and articles only are entered into previous to a marriage, by which it is agreed, that the wife shall have a power to dispose of any estate which may descend to her, it will be sufficient, and a court of equity will support such a power. 4 Cru. Dig. 238. *Wright v. Lord Cadogan*, 6 Bro. P. C. 156. Ambl. 468. *Rippon v. Dowding*, Ambl. 565. Et vid. *Doe v. Staple*, 2 T. R. 684. *Dillon v. Grace*, 2 Sch. & Lef. 456. But where the agreement is, that the wife may dispose of the estate by will, a will made before the marriage, although subsequently to the agreement, will be revoked by the marriage, unless expressly authorized by the articles to be made before marriage, *Hodsdon v. Lloyd*, 2 Bro. C. C. 534. *Doe v. Staple*, 2 T. R. 684. 697; it will not however be inferred that the power was only to be executed in the event of the wife surviving the husband, from the circumstance that it was to be executed by will only, although a *feme covert* cannot make a proper will. *Driver v. Thompson*, 4 Taunt. 294. Sugd. Pow. 153. An infant may execute a power simply collateral, deriving its effect from the statute of Uses, Sugd. Pow. 153. And it has been thought, that an infant may execute even powers appendant, and in gross, if it be expressly inserted in the deed creating the power; that the infant may execute such power during his infancy, see *Hearle v. Greenbank*, 3 Atk. 695. 1 Ves. 298. 4 Cru. Dig. 236. 1 Prest. Abstr. 326. Sed vid. Sugd. Pow. 155, cited ante, vol. 1. p. 175. n. (35). That a power of appointment does not prevent the vesting of the estates limited in default of appointment, see *Cunningham v. Moody*, 1 Ves. 174. *Doe v. Martin*, 4 T. R. 39. Fearn. Cont. Rem. 4th ed. 298, 299. *Madox v. Jackson*, 2 Bro. C. C. 588. *Vanderzee v. Aclom*, 4 Ves. 771. *Maundrell v. Maundrell*, 7 Ves. 563. S. C. 10 Ves. 265. *Osbrey v. Bury*, 1 Ball. & B. 53. Ante, p. 130. n. (r); and that the same doctrine applies to personality, see Sugd. Pow. 142; and where the money is absolutely given over in default of appointment, it is vested, subject to be divested by the execution of the power. Ibid. Et vid. *Coleman v. Seymour*, 1 Ves. 209. 2 Ves. 208. *Gordon v. Leis*, Ambl. 364. *Reade v. Reade*, 5 Ves. 748.

2dly. With respect to the execution of powers.—It is a general rule, that all the forms and circumstances prescribed by the deed creating the power, must be strictly observed. See *Digger's case*, 1 Co. 173. *Thrupton v. Attorney-General*, 1 Vern. 340. *Hawkins v. Kemp*, 3 East, 410. *Bath and Montague's case*, 3 Ch. Ca. 55. 2 Freem. 193. *Gibbet v. Lee*, Hob. 312. *Ward v. Lenthall*, 1 Sid. 143. *Dormer v. Thurland*, 2 P. Wms. 506. *Thayer v. Thayer*,

Palm. 112. *Wright v. Wakeford*, 17 Ves. 454. S. C. 4 Taunt. 213. *Marison v. Turnour*, 18 Ves. 175. *Doe d. Mansfield v. Peach*, 2 Maul. & S. 576. *Doe v. Pearce*, 2 March. 102. *Wright v. Barlow*, 3 Maul. & S. 512. *Moodie v. Reid*, 1 Mad. Rep. 516. S. C. 7 Taunt. 355. And where the particular instrument by which the power is to be executed, is specified, it must be adopted. Therefore if a deed is expressly required, the power cannot be executed by will. *Darlington v. Pulleney*, Cowp. 260. *Doe v. Lady Cavan*, 5 T. R. 567. 6 Bro. P. C. 175. *Bashell v. Bashell*, 1 Rep. Temp. Redesdale, 96. 4 Taunt. 297: nor can a power which is expressly required to be executed by will, be executed by any act to take effect in the life-time of the donee of the power. *Whaley v. Drummond*, Sugd. Pow. 209. *Reid v. Shergold*, 10 Ves. 370. *Anderson v. Dawson*, 15 Ves. 532. *Heatley v. Thomas*, ib. 596. But the mere circumstance of the estate being limited to A. for life, and "after his death," or "then," to be at his disposal, will not, by implication, restrain the execution of the power to a will, *Anon.* 3 Leon. 71. *Tomlins v. Dighton*, 1 Com. 194. 1 P. Wms. 149; although it has been decided, that a devise to the testator's wife or her life, and also at her disposal afterwards to leave it to whom she pleased, gave her a power of disposition by will only, by reason of the word *leave*, which was not properly applicable to a disposition by deed, *Doe v. Thorley*, 10 East. 438. So if the bequest had been to her for life, and then to devise as she might think proper; for the word *devise* will admit but of one sense; though it would be otherwise if the bequest had been to her for life, to dispose thereof as she should devise and think proper, which words would give her a general power. See *Grace v. Wilson*, Rolls, MSS. Oct. 1811. Sugd. Pow. 210. Although where a power is required to be executed by will, it cannot be executed by deed, yet if the instrument is in its nature testamentary, the mere circumstance of its being in the form of a deed, will not, prevent it from operating as a will. *Anon.* Dyer, 314 a. pl. 97. *Hixon v. Wytham*, 1 Ch. Ca. 248. *Green v. Proude*, 1 Mod. 117. *Habergham v. Vincent*, 2 Ves. jun. 204. And although all the circumstances required by the person who creates the power, must be strictly pursued, yet there are few cases in which the courts require any thing beyond the strict letter of the power; therefore, where a writing under hand and seal is required, it need not be delivered, (*Carter v. Carter*, Moss. 369), although writings under hand and seal are usually delivered also; so if the deed is required to be duly attested, an attestation by one witness will be sufficient. *Poulson v. Wellington*, 2 P. Wms. 533. And where a power is given generally without any restrictions as to the mode in which it is to be executed; or if words of a general nature only, such as writing or instrument be inserted, it may be exercised either by deed or will. *Kibbett v. Lee*, Hob. 312. *Roscommon v. Fowke*, 6 Bro. P. C. 158. And where a power is not restrained to be executed by deed, a simple note in writing, even unattested, would be a good execution of the power. *Saunders v. Owen*, 2 Salk. 467. Et vid. 3 East. 440. So whether it be a common law authority given by will, or a power operating under the statute of Uses, it may be executed by feoffment (*Daniel v. Upley*, Latch. 9. 39. 134. 1 Jo. 137), covenant to stand seised (*Slapleton's case*, 1 Ventr. 228. *Dame Hastings's case*, Raym. 239. S. C. 3 Kel. 511. *Right v. Thomas*, 3 Burr. 1141. *Wykham v. Wykham*, 11 East. 458), lease and release (*Dyer v. Aysiter*, 1 P. Wms. 165. 10 Mod. 104. nom. *Gier v. Osseter*. *Dighton v. Tomlinson*, 1 P. Wms. 149), or lease and release and fine, Sugd. Pow. 68: which modes, however, operate only as an appointment of the estate, or declaration of use under the power. Ibid. 201.* It has been said, that if a power given generally, relate to real estate, and the donee exercise the power by will, the will must be executed according to the statute of Frauds, *Longford v. Eyre*, 1 P. Wms. 740. *Wagstaff v. Wagstaff*, 2 P. Wms. 258; but this doctrine has been doubted; and it seems, according to the better opinion, that, where a power is given generally, and without reference to any instrument, a will made in execution of it need not be in the presence of three witnesses. See Sugd. Pow. 201. A power over real estate may be reserved to be executed by will unattested, or attested by only one or two witnesses. *Day and Thwaites*, 3 Ch. Ca. 69. *Wilkes v. Holmes*, 9 Mod. 485. So the reservation of a power to be executed by a writing in the nature of a will, without witnesses, is equally valid. *Longford v. Eyre*, 1 P. Wms. 740. But a man cannot reserve such a power to himself by his own will, because that would be an evasion of the statute of Frauds. *Habergham v. Vincent*, 2 Ves. jun. 204. The mode in which the instrument is to be executed is mostly expressed, but sometimes implied: expressed, as that it shall be signed in the presence of two witnesses; implied, as where a power is given to appoint an estate generally by deed or will, without defining the manner in which it is to be executed, or even expressing that it shall be duly or legally executed, it is implied that the deed or will shall be executed in the manner prescribed for the execution of deeds and wills by the common and statute law. Sugd. Pow. 224. Therefore a deed made in execution of a power must be sealed, and a will, in the case of real estate, must be executed according to the statute of Frauds. 1 P. Wms. 741. And it is the same

where "a writing in the nature of a will" is required. 9 Mod. 485. But where a power to be executed by will embraces both real and personal estate, the will, although not executed with the solemnities required by the statute of Frauds, yet may be valid as to personality, though void as to real estate. *Duff v. Dalzell*, 1 Bro. C. C. 147. If, however, a power is given to be executed by will, "duly executed and attested," one witness, at least, is necessary to the will; although it is of personal estate, and but for the terms of the power no witness to the will would have been necessary. *Sanders v. Franks*, 2 Mad. Rep. 147. A will made in execution of a power, not only operates as an execution of the power, but also in most respects partakes of the qualities of a proper will, 1 Ves. 139. 2 Ves. 77, 612; therefore a will made in execution of a power is ambulatory till the death of the testator, and consequently is revocable without reserving a power of revocation, *Lawrence v. Willes*, 2 Bro. C. C. 319; whereas, we have seen, that where the power is executed by deed, the appointment cannot be revoked, unless an express power of revocation is reserved in the deed. Ante, p. 125. n. (q 3). So an appointment by will under a power will lapse by the death of the donee in the testator's life-time, *Oke v. Heath*, 1 Ves. 135. *Vanderzee v. Aclom*, 4 Ves. 177. *Burgess v. Mawbey*, 10 Ves. 319; but although the appointee survive the testator, yet he will only take from the time of the testator's death. *Vanderzee v. Aclom*, supra. *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61. *Southby v. Stonehouse*, 2 Ves. 616. The instrument by which the power is executed, need not recite the power. *Clere's case*, 6 Co. 17. *Scrope's case*, 10 Co. 143. *Guy v. Dormer*, T. Raym. 295. *Deg v. Deg*, 2 P. Wms. 414; and if the estate subject to the power, be referred to in terms which include it with the other property of the appointor, it will be sufficient, although it be not particularized. *Probert v. Morgan*, 1 Atk. 441. It is also observable, that where several modes of executing a power are stated, it is in the election of the donee, in the absence of a direction to the contrary, to execute it in which of the ways he please. *Harris v. Rerie*, 1 Keb. 348. So a power given to be executed by a single instrument as a deed, may be executed by several assurances, provided they have such a relation to each other, that they can be considered as making together but one assurance. *Herring v. Brown*, 2 Show. 185. *Hawkins v. Kemp*, 3 East. 410. So powers of appointment and revocation may be executed at different times, over different parts of the estate, or over the whole estate, but not to the full extent of the power. *Digge's case*, 1 Co. 173. *Sir R. Lee's case*, 1 Andr. 67. Ante, 237 a. p. 124. And a power, though exhausted at law, may be but partially executed in equity. Thus, where a person having a power of revocation and appointment, mortgages the lands in fee, such mortgage in equity operates only as a partial execution, a mortgage being considered in equity merely as a security for the debt. *Perkins v. Walker*, 1 Vern. 97. *Thorne v. Thorne*, 1 Vern. 141. 182. *Lassels v. Lord Cornwallis*, Prec. Ch. 232. And whatever may be the form of the instrument, if it be in effect simply a mortgage, it will operate merely as a revocation *pro tanto*. But where there is not only a mortgage but an ulterior disposition inconsistent with the former, it will operate even in equity as a total appointment or revocation, unless there be a declaration that it shall be an appointment or revocation only *pro tanto*. *Fitzgerald v. Fauconberg*, Fitzg. 207. 6 Bro. P. C. 290. Sugd. Pow. 272. It is also observable, that although at law a different interest cannot be given from that mentioned in the power, for example—a chattel interest instead of a freehold (*Whitlock's case*, 8 Co. 69 b. *Rattle v. Popham*, Stra. 992. *Roe v. Prideux*, 10 East, 158.), yet where the nature of the interest in the same, an appointment of a lesser estate than that which the appointor was enabled to limit, will be good at law as well as in equity. Sugd. Pow. 447. *Phelp v. Hay*, Ibid. App. No. 17. But where a person has a power of appointment *unto and among* his children, in such shares and proportions as he shall think proper; the appointor must give the whole among the children; and although at law any share, however nominal, will be a good execution of the power, 1 Vern. 67. 1 T. R. 438. n. Et vid. 4 Ves. 785. 16 Ves. 26. *Morgan v. Surman*, 1 Taunt. 289; yet in equity the gift of a sum merely illusory with reference to the amount of the fund, and the number of the objects among whom it is to be distributed (as if a man give one of his children 10,000l. and another only 2s. 6d.) will be void. *Gibson v. Kiven*, 1 Vern. 66. *Vanderzee v. Aclom*, 4 Ves. 771. *Ker v. Duke of Roxburghe*, 2 Dow. 199, 200. So where a man, with such a power of appointment, gave a proper share to a daughter at death's door, at the time, in this way (as he would be her administrator) making a gift to himself, it was held bad; for the power, though discretionary, must not be abused, but substantially executed, S. C. But all the interests given to the child, contingent as well as vested, must be taken into consideration. *Baz v. Whitebread*, 16 Ves. 15. The question, whether an appointment is, or is not illusory, must be determined upon the circumstances of each case, according to a sound discretion: the power, however large the terms, being in some degree coupled with a trust; but an equal distribution is not required; nor any reason for the inequality; unless

a share is clearly unsubstantial. *Butcher v. Butcher*, 1 Ves. & B. 79. S. C. 9 Ves. 382. Et vid. *Mocatta v. Lousada*, 12 Ves. 123. *Dyke v. Sylvester*, 12 Ves. 126. *Baz v. Whitebread*, 10 Ves. 31. 16 Ves. 15. Where a power of appointment extends over different funds amongst the same objects, part of each fund need not be appointed to each; for example—if there are two objects, all the realty may be given to one, and all the personality to the other. *Morgan v. Surman*, 1 Taunt. 289. An appointment, apparently illusory, may be justified by circumstances; as if a child become a bankrupt, and has not obtained his certificate. *Baz v. Whitebread*, supra. And where a father, having advanced a child upon marriage, recited that as a reason for giving her a small share, it was held not to be illusory. *Bristow v. Warde*, 2 Ves. jun. 366. Et vid. *Smith v. Lord Camelford*, lb. 698. *Vanderzee v. Acclom*, 4 Ves. 771. *Long v. Long*, 5 Ves. 445. *Spencer v. Spencer*, 5 Ves. 362. *Baz v. Whitebread*, supra. But it seems that in these cases the provision must move from the person intrusted with the power of appointment. *Mocatta v. Lousada*, 12 Ves. 123. *Baz v. Whitebread*, 16 Ves. & B. 97. Sed vid. *Vanderzee v. Acclom*, 4 Ves. 785. It is however clearly settled, that it must not move from the person creating the power. *Kemp v. Kemp*, 5 Ves. 861. *Lynght v. Royse*, supra. So an illusory appointment cannot be set aside, if the parties have agreed to abide by the intention of the appointor. *Pawlet v. Pawlet*, 1 Wils. 224. Where the fund is given by the instrument creating the power to the objects in default of appointment, the dying without any appointment as to a part is considered equal to an actual appointment; and therefore a sufficient share being permitted to descend, will prevent any question of illusion. *Wilson v. Piggott*, 2 Ves. jun. 351. And if an appointment be made of part of the fund, including some of the objects, but leaving a share not illusory to descend, and afterwards an appointment be made of the residue, wholly excluding or giving an illusory share to some, the last appointment only shall be void, so that the residue may descend and uphold the former appointment. *Wilson v. Piggott*, supra. Et vid. 1 Ves. & B. 101. Sugd. Pow. 490. Where the appointment is set aside as illusory, the fund is distributed equally amongst the objects. *Gibson v. Kinven*, 1 Vern. 66. Et vid. *Alexander v. Alexander*, 2 Ves. 640. *Kemp v. Kemp*, 5 Ves. 859. But an appointment to one child under a power of appointment to one or more, is good if fairly made, *Daubeny v. Cockburn*, 1 Meriv. 644; though, if fraudulent, it has no consideration to support it. S. C. It is further observable, that a condition cannot be annexed to an estate created under a power, without an express authority. So that if a parent, having a power to appoint a sum of money amongst his children, qualifies his appointment to one of them, with a condition, that he shall release a debt or pay a sum of money, the appointment will be absolute and the condition void, *Pawlet v. Pawlet*, 1 Wils. 224. *Burleigh v. Pearson*, 1 Ves. 281. *Alexander v. Alexander*, 2 Ves. 640. *Daubeny v. Cockburn*, 1 Meriv. 645: but where an agreement is made by one of the objects of a power to return part in consideration of an appointment in its favour, it is a fraud in the appointee as well as in the appointor, both on the other objects of the power, and on the party who is to take in default of appointment. S. C. An appointment, also, cannot be made to persons not objects of the power; therefore a power to appoint to children will not authorize an appointment to grandchildren. *Alexander v. Alexander*, 2 Ves. 640. *Bristow v. Warde*, 2 Ves. jun. 336. *Whistler v. Webster*, lb. 367. *Smith v. Lord Camelford*, lb. 698. *Crombe v. Barrow*, 4 Ves. jun. 681. *Adams v. Adams*, Cowp. 661. *Brudenell v. Ehves*, 1 East. 432. 7 Ves. 342. *Bulcher v. Butcher*, 9 Ves. 382. But they may be appointed too with the child's consent. *Routledge v. Dorril*, 2 Ves. jun. 357. *Langstone v. Blackmore*, Amb. 289. *White v. St. Barbe*, 1 Ves. & B. 399. A power to appoint to children living at the parent's death includes a child *en ventre sa mere* at that time. *Beale v. Beale*, 1 P. Wms. 244. *Clark v. Blake*, 2 Bro. C. C. 320. *Thelluson v. Woodford*, 4 Ves. 226. But where the estate is settled on the eldest son, and subject to that, a power is given of appointing portions to the younger children; a younger child becoming eldest before receiving his portion, is not within the power. *Chadwick v. Doleman*, 2 Vern. 528. *Lord Teynham v. Webb*, 2 Ves. 198. *Lady Lincoln v. Pelham*, 11 Ves. 166. *Bowles v. Bowles*, 11 Ves. 177. *Leake v. Leake*, 10 Ves. 477. *Savage v. Carroll*, 1 Ball. & B. 265. A power cannot be delegated to another, whether the power relates to the land, or is collateral to it, it being a principle of law, that *delegatus non potest delegare*. *Ingram v. Ingram*, 2 Atk. 88. *Hamilton v. Royse*, 2 Sch. & Lef. 330. *Alexander v. Alexander*, 2 Ves. 640. *Bristow v. Warde*, 2 Ves. jun. 336. But where the power is originally authorized to be executed by the donee and his assigns, and is annexed to an interest in the donee, it will pass with it to any person who comes to the estate under him; and whether the claimant is an assignee in fact, or an assignee in law, as an heir or executor. *How v. Whitefield*, 1 Ventr. 338, 339. Show. 57. 1 Freem. 476. So the donee of a power not annexed to an interest, may delegate the power by virtue of an *express authority* in the deed, by which it was created. See *Pallister v. Ord*, Bunb. 166. But the person to whom such a power is

delegated, must come within the express words authorizing the delegation. See *Cole v. Wade*, 16 Ves. 27. That a power is not forfeited by attainder for treason, unless where the execution of it is not annexed to the mind or hand of the donee, see Sugd. Pow. 175. Where it is forfeited, it must be executed in the life of the donee. *Ibid.* 176. That where a man has both a power and an interest, and he creates an estate which will not have an effectual continuance in point of time, if it be fed out of his interest, it shall take effect by force of the power, see *Roger's case*, 1 Vent. 228. *Earl of Leicester's case*, 1 Vent. 287. Ante, p. 441. n. (c 1). It is *intention* that in these cases governs: therefore, where it can be inferred that the power was not meant to be exercised, it will not be deemed to be executed. *Hookham v. Hales*, 2 Ves. & B. 45. Thus if a man, having several powers over different estates, and also interests in them, should recite the power over one estate, and execute it in a formal manner, and then recite, not that he has a power to appoint the other estate, but that he is seised in fee of it, and accordingly convey his interest in it by lease and release, the latter estate would be held to pass out of his interest, and not by force of his power, simply on the apparent intention not to execute the power. *Maundrell v. Maundrell*, 7 Ves. 567. 1 Ves. 246. Et vid. 6 East. 105, 106. *Adney v. Field*, Ambli. 654. Sugd. Pow. 292. Where not only the use is appointed under the power, but also the estate is conveyed by force of the interest, the rule appears to be, that the instrument shall be construed either an appointment, or a release, as will best effect the intention of the parties. *Ibid.* 296. *Cox v. Chamberlain*, 4 Ves. 631.

3dly. With respect to the effect of the execution of a power.—We have seen, that in whatever mode the power is exercised, whether by an act *inter vivos*, as grant, bargain and sale, lease and release, covenant to stand seised, feoffment and fine, or by a will, the instrument in every case operates strictly as an appointment or declaration of the use; and as there cannot be a use on a use, the bargainee, &c. takes the legal estate, the appointment being made to him; and if any ulterior use is declared, it operates merely as a trust in equity. Supra, p. 587, 588. Sugd. Pow. 320. 2 Prest. Conv. 483. And an appointment in pursuance of a power operates under the statute of Uses, not as a conveyance of the land, but as a substitution of a new use, in the place of a former one; and, in general, a deed executing a power cannot be considered as a new alienation, or independent conveyance, *Lady Gresham's case*, Mo. 261: but there are cases in which a deed executing a power is for many purposes considered as a substantive, independent instrument. Thus an appointment under a power is considered as a conveyance within the register acts; and, if not registered, will be postponed to a subsequent mortgage duly registered. *Scrifflon v. Quincy*, 2 Ves. 413. And a deed executing a power has been deemed a conveyance within the statute 27 Eliz. c. 24. 2 Ves. 65. Et vid. *Bartlett v. Ramsden*, 1 Kebl. 570. So, although the estate did not originally belong to the donee of the power, and the estate created by the appointment is considered as limited by the deed creating the power, yet a person deriving title under an appointment, is considered as claiming *under* the donee, within the meaning of a covenant by him for quiet enjoyment against any person claiming under him. *Hurd v. Fletcher*, Dougl. 43. Sugd. Pow. 324, 325. It is also observable, that estates created by the execution of a power take effect precisely in the same manner as if created by the original deed. As if a general power of appointment be given to a man by deed, and he by virtue of his power limit the estate to A. for life, with remainder to his children in strict settlement, these limitations will take effect as estates limited by the original deed; and in exactly the same way as they would have done had they been limited in that deed by the grantor of the power. *Middleton v. Crofts*, 2 Atk. 661. The appointee takes under the power as if inserted therein: but not so as to take by relation from the creation of the power, as in case of an assignment in a commission of bankruptcy, that is, by force of the statute, and to avoid mesne wrongful acts. Per Lord Hardwicke, *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61. Where a person settles his estate to the use of himself for life, remainder over, reserving to himself a power of revocation, and executes his power; he becomes immediately seised of his former estate, without any entry or claim; because, as he is already in possession, he cannot enter on himself, and a claim is unnecessary. Ante, 237 a. p. 124. Where an estate is limited to such uses as a man shall appoint, and in default of appointment to him in fee, as he is seised in fee until appointment, his wife becomes entitled to dower; but if he executes his power of appointment, a new use arises, and vests in the appointee, and the fee-simple originally limited to the appointor ceases, by which means it is supposed that his wife's right to dower will also cease. See *Cave v. Holford*, 3 Ves. 657. *Cox v. Chamberlain*, 4 Ves. 631. *Maundrell v. Maundrell*, 10 Ves. 246. However, in order to prevent this question from arising, as the point has not been expressly decided, it is usual, in the limitations to bar dower, to give an interposed estate in default of appointment to a trustee. Sugd. Pow. 332. But it is clear, that a power to create leases, or any other estate to take effect in possession, will

control and over-reach all the estates in the settlement. *Bonworth v. Farrand*, Cart. 111. *Talbot v. Tipper*, Skin. 427. *Beale v. Beale*, 1 P. Wms. 244. *Mosley and Mosley*, 5 Ves. 248. *Stackhouse v. Barnston*, 10 Ves. 453. But the execution of a power will not defeat an estate previously created by the person who executes it. *Goodright v. Cator*, Dougl. 477. Where several powers have been given by the same deed, and two or more of them are executed, and no provision has been made in regard to their priorities, the priority of the estates created under them must be construed according to the intention of the settlement, and the object of the powers. *Yellend and Frielis*, Mo. 788. It is mostly usual, however, to provide by the settlement for the priority of the several powers contained in it. Ante, p. 578. n. (A).

4thly. With respect to equitable relief, in case of a defective execution of a power.—There are three cases in which equity will relieve against a defective execution, 1st. Where there is a consideration, as in favour of a purchaser (*Fothergill v. Fothergill*, 2 Freem. 257. 3 Ch. Cas. 68. Cowp. 267.), which term includes a mortgagee and a lessee (*Barker v. Hill*, 2 Ch. Rep. 113. *Bradley v. Bradley*, 2 Vern. 163. *Taylor v. Wheeler*, 2 Vern. 564. *Jennings v. Moore*, Ib. 609. *Reid v. Shergold*, 10 Ves. 370. *Marnel v. Blake*, 4 Dow. 264.), or in favour of a creditor (*Fothergill v. Fothergill*, supra. *Pollard v. Greenwil*, 1 Ch. Cas. 10. 1 Ch. Rep. 98. *Wilkes v. Holmes*, 9 Mod. 485. *Rhett v. Beane*, 1 Ves. 215. *Bizby v. Eley*, 2 Bro. C. C. 325. 2 Dick. 698.), wife (Cowp. 267. *Fothergill v. Fothergill*, supra. *Lady Clifford v. Earl of Burlington*, 2 Vern. 397. *Coventry v. Coventry*, 2 P. Wms. 232. Ibid. 705. *Wykham v. Wykham*, 18 Ves. 423.), or a great grandchild. (*Sarsh v. Lady Blamfray*, Gilb. Eq. Rep. 166. *Sneed v. Sneed*, Ambl. 64. Cowp. 264, 265, 267.), or in favour of a marriage consideration, and although the power was executed after the marriage. *Fothergill v. Fothergill*, supra. *Hervey v. Hervey*, 1 Atk. 561. *Churchman v. Hervey*, Ambl. 335. But the same equity is not extended to a natural child, *Furakur v. Robinson*, Prec. Ch. 475. *Tudor v. Anson*, 2 Ves. 582; nor to a grandchild, *Perry v. Whitehead*, 6 Ves. 544, and see the cases there cited; nor to a brother or sister, *Goodwyn v. Goodwyn*, 1 Ves. 228. *Goring v. Nash*, 3 Atk. 189; nor to a nephew (*Strode v. Russell*, 2 Vern. 621. *Marston v. Gowan*, 3 Bro. C. C. 170. *Piggot v. Penrice*, Com. 250.), or cousin, *Tudor v. Anson*, 2 Ves. 582; nor to a husband (*Moodie v. Reid*, 1 Mad. Rep. 516, unless he is a purchaser by marriage, *Sergison v. Sealey*, 2 Atk. 412.), or a mere volunteer. *Smith v. Ashton*, 2 Freem. 309. 3 Ch. Cas. 113. 126. *Sargeson v. Sealey*, 2 Atk. 415. *Godwin v. Kilsha*, Amb. 684. And it seems that a defective execution in favour of a stranger cannot be supplied so as to give the fund to creditors. See Sugd. Pow. 343. The person applying for relief must have a preferable equity to the person against whom he seeks relief. *Jewers v. Jewers*, Dom. Proc. 1734. Sugd. Pow. 344. *Mortlock v. Buller*, 10 Ves. 292. But it seems that a defect may be supplied, although all the objects are children. Sugd. Pow. 350. Where there are several defective executions, equity will supply the defect in the last, in order to effectuate the intent of the parties. *Hervey v. Hervey*, supra. And generally, if the intention to execute the power clearly appears in writing, it is sufficient, whether it be by covenant (*Fothergill v. Fothergill*, supra. *Sergison v. Sealey*, supra. Et vid. 15 Ves. 173.), request by will (*Vernon v. Vernon*, Ambl. 1.), or by a written contract, not under seal. *Shannon v. Bradstreet*, 1 Rep. Temp. Redesdale, 52. *Mortlock v. Buller*, 10 Ves. 292. So equity will supply the defect where a man promises by letters to grant an estate which he can only do by exercise of his power. *Campbell v. Leach*, Ambl. 740. So if the intention appear from a recital in the deed of appointment (*Wilson v. Piggot*, 2 Ves. jun. 351.), or from an answer to a bill in chancery (*Carter v. Carter*, Mose. 365. *Fortesque v. Gregor*, 5 Ves. 553.), or from a covenant in the original deed (*Sarsh v. Lady Blamfray*, supra.), it will amount to an equitable execution of the power. But there must be a reference to the fund to show the party's intention to execute the power, or the party must be in possession of no other fund upon which the covenant can operate. *Jackson v. Jackson*, 4 Bro. C. C. 462. *Hele v. Hele*, 2 Ch. Cas. 28, 29. 87. 1 Vern. 406. *Jones v. Tucker*, 2 Meriv. 533. 2d. Equity supplies a defective execution, where there is any fraud (*Ward v. Booth*, 3 Ch. Cas. 69. *Piggot v. Penrice*, Com. 250. Prec. Ch. 471. *Stiles v. Cowper*, 3 Atk. 692. *Shannon v. Bradstreet*, supra. *Anon*, Bunb. 53. *Stratford v. Lord Aldborough*, 1 Ridgw. P. C. 281.) or surprise accompanied with fraud and circumvention. 3 Ch. Cas. 114, 115. 3d. So equity will relieve where the party was prevented from executing his power by accident or disability. See *Earl of Bath's case*, 3 Ch. Cas. 68. Et vid. Cowp. 267. *Piggot v. Penrice*, supra. Lastly, equity will relieve against a defective execution, although it be by deed instead of will (*Tillet v. Tillet*, 2 P. Wms. 489. S. C. Mose. 46. *Sneed v. Sneed*, Ambl. 64. Cowp. 264, 265.), or although there are two witnesses instead of three (*Parker v. Parker*, Gilb. Eq. Rep. 168. *Cotter v. Loyer*, 2 P. Wms. 623. Mose. 227. *Sergison v. Sealey*, 2 Atk. 412.

(590)* *And it is to be observed (as hath been said), that there is a diversity between a feoffment of lands at this day upon confidence,* or to the intent to perform his last will, and a feoffment to the use of such person and persons, and of such *estate and estates, as he shall appoint by his last will: for, in the first case, the land passeth by the will, and not by the *feoffment; for after the feoffment the feoffor was seised in fee-simple as he was before; but, in the latter case, the will pursuing his power is but a direction of the uses of the feoffment; and the estates pass by execution of the uses, which were raised upon the feoffment; but in both cases the feoffees are seised to the use of the feoffor and his heirs in the mean time; and all this and much more concerning this matter hath been adjudged (c).

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Godwin v. Fisher, 1 Bro. C. C. 367. *Wade v. Paget*, 1 Bro. C. C. 365., or though a seal be wanting, *Smith v. Ashton*, Finch. 273. 3 Keb. 551. 1 Ch. Cas. 263, 264. 1 Freem. 308. 3 Ch. Cas. 69. 106; and although the subject of the power be real estate, yet this relief is afforded as well where the defective instrument is a will, as where it is an act *inter vivos*. *Wilkes v. Holmes*, 9 Mod. 485. 1 Rep. Temp. Redesdale, 60 n. 1 Dick. 105. 2 P. Wms. 228. Sugd. Pow. 360. But the non-execution of a power is in general never aided, *Arundel v. Philpot*, 2 Vern. 69. *Tomkyn v. Sandys*, 2 P. Wms. 228. n. Wilm. 33. *Bull v. Vardy*, 1 Ves. jun. 272. *Piggot v. Penrice*, Com. 250. Gilb. Eq. Rep. 138: unless the power is in nature of a trust. *Garfoot v. Garfoot*, 1 Ch. Cas. 35. *Gwilliams v. Rowell*, Hardr. 204. *Anly v. Doyl*, 1 Ch. Cas. 180. 1 Ch. Rep. 89. nom. *Anly v. Gower*; *Witchot v. Souch*, 1 Ch. Rep. 97. *Hyer v. Wordale*, 2 Freem. 135. *Locton v. Locton*, Freem. 136. *Carvill v. Carvill*, 2 Ch. Rep. 156. As to equitable relief in the case of defective execution of leasing powers, see ante, p. 440. n. (c 1). With respect to the extinguishment and destruction of powers, see ante, p. 458. n. (L), and p. 578. n. (A).—[Ed.]

(c) Before closing this chapter, it may be proper to consider, 1st. What uses are not executed by the statute; and, 2dly. The nature and general doctrine of trusts.

1st. As to what uses are not executed by the statute.—We have seen, that for the execution of an use there must be, 1st. A person *seised* to the use; 2dly. A *cestui que use in esse*; 3dly. A use *in esse*, scil. in possession, reversion, or remainder; 4thly. An estate or seisin, out of which the use is to arise; for the words of the statute are, that the estate of such person seised to the use shall be adjudged in *cestui que use*, &c. 1 Co. 126 a; and if these requisites do not concur, there can be no execution of the use. Therefore contingent uses, during the suspense of the contingency cannot be executed by the statute. Bac. Uses, 45. 1 Sand. 194. Uses limited of copyhold estates, also, are not within the statute of Uses. Co. Copyh. 54. Cro. Car. 44. 2 Ves. 257. And as the statute was made previously to the statute of Wills, 32 & 34 H. 8, it seems to follow, that the former does not extend to *devises* to uses. But as the testator's intention is generally the guide in cases of devises, it has been repeatedly determined, that if A. devise to B. and his heirs, to the use of, or in trust for C., and his heirs, or in trust to permit C. and his heirs to take the profits, it shows, that the testator intended, that C. should have the *legal* estate in fee; and the law will therefore give the devise such an operation. 1 Vern. 79. 415. 2 Salk. 679. 2 Atk. 573. 2 P. Wms. 134. *Doe, d. Leicester v. Biggs*, 2 Taunt. 109. *Brydges v. Wotton*, 1 Ves. & B. 137. But it is clearly settled that in the case of a devise to the use of A. *for life*, remainder over, this cannot take effect by way of use executed by the statute, because there is no *seisin* to serve the use; but still the *cestui que use* will have the legal estate. 1 Sand. 206. So although a feoffment in fee to the use of the feoffor for life, and after his decease that J. S. *shall take the profits*, be an use executed in J. S.; yet it is clear that if there be a conveyance in trust to pay over the profits, (*Symson v. Turner*, 1 Eq. Ab. 383. *Silvester v. Wilson*, 2 T. R. 444. 15 Ves. 371. *Shopland v. Smith*, 1 Bro. C. C. 75. *Doe d. Leicester v. Biggs*, supra,) or to convey, (*Roberts v. Dixwell*, 1 Atk. 607. Bac. Uses, 8), or to sell, (*Bagshaw v. Spencer*, 2 Atk. 578), the legal estate will vest in the trustees in order to enable them to pay over the profits. So it is in case of a trust to permit a feme covert to receive the profits, or to pay the same to her separate use. *Pybus v. Smith*, 3 Bro. C. C. 340. *Henry v. Purcell*, Fearn. 75. *Nevill v. Saunders*, 1 Vern. 415. *Bush v. Allen*, 5 Mod. 63. As to the extent of the legal estate vested in trustees under

trusts of the above description, see *Doe, d. White v. Simpson*, 5 East. 162. *Jones v. Say and Sele*, 8 Vin. 262, pl. 19. 3 Bro. P. C. 113. 1 Ves. 144. *Bagshaw v. Spencer*, 2 Atk. 570—577. 1 Ves. 142—144. *Gibson v. Rogers*, Amb. 93. *Wright v. Pearson*, ib. 360. *Horton v. Horton*, 7 T. R. 652. It has been determined, that terms of years or other chattel interests cannot be limited to uses, as the statute speaks of persons *seised* to the use of another, and the word “seised” is only applicable to the possession of a freehold estate. Bac. Uses, 42. And that *under a use can be executed by the statute*; and therefore if there be a conveyance *to the use of B. and his heirs*, to the use of B. and his heirs, this use cannot be executed in B. *ver, 155 a. Sambach v. Dalton*, Toth. 1 Atk. 591. So if land be limited to A. and his heirs *to the intent*, or in trust that B. and his heirs may receive a rent thereout *to the use of C. and his heirs*, the legal estate in the rent will vest in B. by the fifth clause of the statute, because the *seisin*, out of which the rent arises, is conveyed to A. and upon the limitation of such rent to A. the statute is satisfied. *Chaplin v. Chaplin*, 3 P. Wms. 229.

2dly. As to the nature and general doctrine of trusts.—The strict construction which the judges put on the statute of Uses, in determining that there were uses to which the statute did not transfer the possession, defeated, in a great measure, its intent: as by this means uses were not entirely abolished, but still continued separate and distinct from the legal estate; and were taken notice of and supported by the court of chancery, under the name of trusts. A trust is therefore a use not executed by the statute 27 H. 8; for originally the words *use* and *trust* were perfectly synonymous, and are both mentioned in the statute. But as the provisions of the statute were not deemed coextensive with the various modes of creating uses, such uses as were not provided for by the statute, were left to their former jurisdiction. 1 Bl. Rep. 136. 1 Cru. Dig. 458. And this jurisdiction extends not only to trusts declared upon a legal estate in fee, but to those declared upon the estates of tenants in tail, for life, and years, and to special trusts. A trust, generally speaking, may be defined to be, a right on the part of the cestui que trust to receive the profits, and to dispose of the lands in equity. 1 Mod. 17. But in the case of special trusts for the accumulation of profits, the sale of estates, or the conversion of one trust fund into another, the cestui que trust cannot interfere until such special trust be satisfied. 1 Sand. 214. There is a distinction between a trust *executed*, and a trust *executory*. A trust executed, is where an estate is conveyed to the use of A. and his heirs, with a simple declaration of the trust for B. and his heirs, or the heirs of his body; in which case the trust is perfect, and it is said to be executed, because no further act is necessary to be done by the trustee to raise and give effect to it; and because there is no ground for the interference of a court of equity to affix a meaning to the words declaratory of the trust, which they do not legally import. So, in the case of a will, a trust is said to be executed, where the testator has given complete directions for settling his estate, with perfect limitations. A trust executory, is where articles of agreement are made in contemplation of marriage, and consequently preparatory to a settlement, or where in a will the testator's directions are incomplete, and are rather minutes or instructions. In the cases of trusts executed, legal expressions will have a strict legal effect, as in immediate devises at law, though, perhaps, contrary to the testator's intention, *Shaw v. Weigh*, 1 Eq. Abr. 184. *Jones v. Morgan*, 1 Bro. C. C. 206. *Poole v. Poole*, 3 Bos. & P. 620; but in the cases of executory trusts, the court will consider the intention, and direct the conveyance according to it, *White v. Carter*, Amb. 91. *Garth v. Baldwin*, 2 Ves. 655; and words of limitation, “as heirs of the body,” will be construed as words of purchase, if the testator has, by expressions in his will, shown an intention that they should not be construed in the former sense. *Glenarthy v. Boswell*, Ca. Temp. Talb. 319. *Papillon v. Voice*, 2 P. Wms. 471. *Bagshaw v. Spencer*, 2 Atk. 570. 581. *White v. Carter*, Amb. 670. *Bastard v. Proby*, 2 P. Wms. 478. n. *Read v. Snell*, 2 Atk. 642. *Leonard v. Earl of Sussex*, 2 Vern. 526. *Roberts v. Dixwell*, 1 Atk. 607. Et vid. *Stanley v. Stanley*, 16 Ves. 491. 1 Mad. Ch. 446. 1 Sand. 248, 249. The execution of executory trusts created by deed, is the same as of executory trusts created by will. 12 Ves. 227. Ante, vol. 1. p. 775. n. (1). And in the execution of an executory trust the court will direct a limitation to be inserted in the settlement to preserve contingent remainders, *Baskerville v. Baskerville*, 2 Atk. 279. *Stamford v. Hobart*, 3 Bro. P. C. 31; and both in wills (*Green v. Stephens*, 12 Ves. 419. 17 Ves. 64. *Marryatt v. Townley*, 1 Ves. 102. 104.) and marriage articles, cross-remainders may be raised by implication. *Twissden v. Lock*, Amb. 663. *West v. Erissey*, 2 P. Wms. 349. *Duke of Richmond v. Lord Cadogan*, cited 17 Ves. 67. Ante, vol. 1. p. 774, 775. n. (1). As to the difference between a trust and an equity of redemption, see ante, p. 38. n. (2). *Tucker v. Thurston*, 17 Ves. 133. Besides the direct modes of creating a trust estate by limiting a use upon a use, by limitations to trustees, to pay over the rents, or for the separate use of a married woman, or to sell, or raise money,

and by limiting copyhold estates, or terms for years in trust, which have been already noticed, there are several other cases in which trust estates arise from the evident intention of the parties, which are enforced by the court of chancery, and are usually called resulting trusts, or trusts by implication. As where articles are entered into for the purchase of an estate, a trust immediately results to the purchaser. 1 Ch. Ca. 39. *Acherley v. Fernor*, 9 Mod. 78. So where an estate is purchased in the name of one person, and the money or consideration is paid by another, a trust results in favour of the person who paid the consideration. *Atk. 150. Willis v. Willis*, 2 Atk. 71. *Gascoigne v. Thuring*, 1 Vern. 366. *Finch v. Finch*, 14 Ves. 50. And it is the same with respect to a joint adventure upon a purchase in the name of one. *Wray v. Steele*, 2 Ves. & B. 388. And resulting trusts by implication of law need no declaration of trust, but are saved by the 20th section of the statute of Frauds, which provides "that all conveyances, where trusts and confidences shall arise or result by implication of law, shall be as if that act had never been made." 1 P. Wms. 119. 2 Vern. 361. And it may be here remarked, that, though this statute enacts that all declarations and creations of trusts of lands or hereditaments must be in writing, yet a note, or memorandum in writing, from a trustee, promising to execute a declaration of trusts (*Bellamy v. Burrow*, Ca. Temp. Talb. 97.), or confessing that he purchased lands with another man's money (*Lane v. Dighton*, Ambl. 409. *Ambrose v. Ambrose*, 1 P. Wms. 329. *Ryall v. Ryall*, 1 Atk. 59.), or a bond from a trustee, either to perform the trusts of a conveyance, in which no trusts are mentioned (*Goodwin v. Cutler*, Finch. 356.), or to make an assignment, as his *cestui que trust* shall direct (*Moorcroft v. Dowding*, 2 P. Wms. 314.), or a recital in a purchase deed, that the consideration money belonged to a third person (*Kirk v. Webb*, Prec. Ch. 84. *Deg v. Deg*, 2 P. Wms. 415. *Ryall v. Ryall*, supra), an answer in chancery, confessing a trust (*Hampton v. Spencer*, 2 Vern. 288. *Cottingham v. Fletcher*, 2 Atk. 155.), or a letter from a trustee disclosing the purposes of a devise to him (*Crooke v. Brookeing*, 2 Vern. 106.), or any writing in the shape of mutual covenants or articles of agreement (*Legard v. Hodges*, 3 Bro. C. C. 531.), relative to the transfer or produce of land, although without seal or stamp (*Hodsdon v. Lloyd*, 2 Bro. C. C. 534.), if they properly discover the intention of the parties, are sufficient, in a court of equity, to create trusts. And any words, in a will, intimating, or in the nature of a request, wish, desire, recommendation, &c. are sufficient to create a trust, if the object of the gift, and the gift itself, can be correctly ascertained, *Eales v. England*, Prec. Ch. 200. *Cloudsley v. Pelham*, 1 Vern. 411. *Jones v. Nabbs*, 1 Eq. Abr. 404. pl. 3. *Richardson v. Chapman*, 1 Burn. Eccl. Law, 225. *Vernon v. Vernon*, Ambl. 3. *Clifton v. Lombe*, Ambl. 519. *Massey v. Sherman*, Ambl. 520. *Nowlan v. Melligan*, 1 Bro. C. C. 489. *Pierson v. Garnett*, 2 Bro. C. C. 38. 226. *Davis v. King*, 2 Bro. C. C. 200. 1 Sand. 252. *Taylor v. George*, 2 Ves. & B. 378. *Birch v. Wade*, 3 Ves. & B. 198; but if the certainty of the gift and object fail, then the trust must also fail, although the intention to create it should appear evident upon the face of the will. *Harding v. Glyn*, 1 Atk. 469. *Le Maître v. Bannister*, 2 Bro. C. C. 40. *Bland v. Bland*, 2 Bro. C. C. 43. *Harland v. Trigg*, 1 Bro. C. C. 142. *Wynne v. Hawkins*, 1 Bro. C. C. 180. *Sprange v. Bernard*, 2 Bro. C. C. 585. *Pierson v. Garnett*, supra. *Hill v. Bishop of London*, 1 Atk. 620. Note, that when an estate is vested in trustees in fee-simple, in trust to raise a sum of money, without specifying the particular mode of raising it, the trust will authorize a sale, *Baines v. Dixon*, 1 Ves. 41. *Wareham v. Brown*, 2 Vern. 153. *Newman v. Johnson*, 1 Vern. 45. 8 Vin. 461. pl. 7, 8. n.; and that a trust to raise money by "rents and profits" will empower the trustees to sell (*Gibson v. Rogers*, Ambl. 93. 8 Vin. 461. pl. 7, 8, 9, 10, 11. *Lingen v. Foley*, 2 Ch. Ca. 205.), unless there are some words to restrain the sense of those words to annual profits. *Joy v. Gilbert*, 2 P. Wms. 13. *Evelyn v. Evelyn*, 2 P. Wms. 666. *Mills v. Banks*, 3 P. Wms. 8. *Anon.* Vern. 104. *Green v. Belcher*, 1 Atk. 506. 1 Sand. 253. It is also observable, that the statute of Frauds does not extend to the declaration or creation of trusts of mere personality. See *Nab v. Nab*, 10 Mod. 404. *Fordyce v. Willis*, 3 Bro. C. C. 587. To return to the case of a purchase in the name of a stranger,—in all cases of this kind, the payment of the money must be clearly proved. *Willis v. Willis*, 2 Atk. 71. Such proof may appear either from expressions or recitals in the purchase deed, 2 Vern. 168. Prec. Ch. 104. *Kirk and Webb*, Ib. 84. cited 1 Sand. 258; or from some memorandum or note of the nominal purchaser, *O'Hara v. O'Neal*, 2 Eq. Abr. 745; or from his answer to a bill of discovery. *Cottingham v. Fletcher*, 2 Atk. 155. Sed vid. *Edwards and Moore*, 4 Ves. 23. cited 1 Sand. 258; or from papers left by him, and discovered after his death, *Ryall v. Ryall*, Ambl. 413. *Lane v. Dighton*, Ib. 409; and it seems that parol evidence is admissible, though after the death of the supposed nominal purchaser. See *Lench v. Lench*, 10 Ves. 511. But where a purchase, either of a fee-simple or a reversion (*Finch v. Finch*, 14 Ves. 50.), is made by a father in the name of a child, legitimate or illegitimate (*Loft. 490.*

Fearn. Post. 327. 2 Fonbl. Eq. 124, 125.) (if in the name of a *grandchild*, the father being alive, *Ebrand v. Dancer*, 2 Ch. Ca. 26. it might be different, see *Lloyd v. Read*, 1 P. Wms. 60.), this distinguishes it from the case of a stranger, in which there is not that natural affection, that would repel the presumption arising from the advance of the money: and it will, unless some precedent declaration can be proved (*Lord Gray's case*, 2 Freem. 6.), be considered as an advancement of the child, and not as a trust for the father, though the father takes the profits during the minority of the child. *Mumma v. Mumma*, 2 Vern. 19. *Lamplugh v. Lamplugh*, 1 P. Wms. 113. *Taylor v. Taylor*, 1 Atk. 386. *Stileman v. Ashdown*, 2 Atk. 480. Finch. 340. *Reddington v. Reddington*, 3 Ridgw. P. C. 106.

But it might be different, if he received the rents and profits after the child was of age, (*Lloyd v. Read*, 1 P. Wms. 608.) especially if the child was of age when the estate was purchased, 2 Mad. Ch. 99; and the presumption in favour of an advancement, is liable to be rebutted by subsequent acts. *Lord Gray's case*, supra. *Pole and Pole*, 1 Ves. 76. A purchase by the father in the names of his son, and a trustee (*Lamplugh v. Lamplugh*, 1 P. Wms. 111.), or, as it seems, in the name of himself and his son (though this has been doubted, 2 Atk. 480.), will still be considered as an advancement. *Scrope and Scrope*, 1 Ch. Ca. 27. *Back and Andrews*, 2 Vern. 120. *Dyer v. Dyer*, 1 P. Wms. 112. 1 Wai. Copyh. 216. *Finch v. Finch*, 14 Ves. 50. But in these instances, the father will have the benefit of survivorship in case the son die during his minority; though the son is not entitled to the benefit of survivorship as against the judgment creditor of his father. *Stileman v. Ashdown*, supra. S. C. Ambl. 13. It seems in all these cases, that if the son is *provided for* at the time of the purchase in his name, he will be but a trustee, and stands in the same predicament as a stranger, *Elliott and Elliott*, 2 Ch. Ca. 232. *Pole and Pole*, supra. *Lloyd v. Read*, 1 P. Wms. 607; but it has been determined, that a reversion settled on the son, expectant on the mother's death, is not such a provision as will prevent the son taking. *Lamplugh v. Lamplugh*, supra. So it seems, if a husband purchases lands in the name of his wife, it will be presumed, in the first instance, to be an advancement and provision for the wife, *Rider and Kidder*, 10 Ves. 367. *Back v. Andrews*, 2 Vern. 67. 128. *Batch v. Andrews*, Ch. Ca. 53. Sed vid. *Smith v. Baker*, 1 Atk. 385; for the wife cannot be a trustee for her husband. *Kingdom v. Bridges*, 2 Vern. 67. It may be further observed, that where a purchase is made by a trustee with trust money, a trust will result to the owner of the money. *Ryal v. Ryal*, Ambl. 413. So where a trustee or guardian renews a lease in his own name, the renewed lease shall in equity be subject to the former trust, *Keech v. Sandford*, Sel. Ca. Ch. 61. *Holt v. Holt*, 1 Ch. Ca. 191. *Pierson v. Shore*, 1 Atk. 480. *Abney v. Miller*, 2 Atk. 597. *Edwards v. Lewis*, 3 Atk. 538. Et vid. *Ex parte Bennet*, 10 Ves. 395. *Brewett v. Millett*, 7 Bro. P. C. 367. Tomlin's edit. *Annesley v. Dixon*, lb. 213. *Featherstonhaugh v. Fenwick*, 17 Ves. 298; even when it is clear that the lessor would not have renewed for the benefit of the cestui que trust. *Fitzgibbon v. Scanlan*, 1 Dow. 161. And if a lease be settled upon A. for life, with remainders over, and A. obtains a renewal of the lease, the renewed lease shall be bound by the trusts of the will or settlement. *Taster v. Marriott*, Ambl. 668. *Raw v. Chichester*, lb. 715. *Owen v. Williams*, lb. 734. *Pickering v. Vowles*, 1 Bro. C. C. 197. *Coppin v. Fernyhough*, 2 Bro. C. C. 291. *Killick v. Flexney*, 4 Bro. C. C. 161. *James v. Dean*, 11 Ves. 383. 15 Ves. 236. But there can be no implied trust between a lessor and lessee; because every lessee is a purchaser by his contract and his covenants, which excludes all possibility of implying a trust for the lessor. *Pilkington v. Bayley*, 7 Bro. P. C. 383. It is also observable, that where a person conveys an estate to a trustee, upon such trusts as he shall appoint, and no appointment is made, there will be a resulting trust for the grantor. *Fitzg.* 223. And where an estate is conveyed to a trustee, and a trust is declared as to part only (*Lloyd v. Spillett*, 2 Atk. 150.), or where the whole of an estate is conveyed for particular purposes, or on particular trusts only, which, by accident or otherwise, cannot take effect, a trust will result to the original owner, or to his heirs. *Prec.* Ch. 162. 541. 1 Cru. Dig. 475. We have seen, that in the absence of express or demonstrable intention to the contrary (*Kirkman v. Milles*, 13 Ves. 338.), it is a rule of equity, that money directed to be laid out in land, and land directed to be sold and converted into money, are to be considered as that species of property into which they are directed to be converted. *Ante*, vol. 1. p. 559. n. (9). Et vid. *Doughty v. Bull*, 2 P. Wms. 323. *Attorney-General v. Johnston*, Ambl. 580. *Robinson and Taylor*, 2 Bro. C. C. 589. *Williams and Coade*, 10 Ves. 500. *Berry and Usher*, 11 Ves. 87. *Gibbs and Ougier*, 12 Ves. 415. But where a person dealing upon his own property only, has directed a conversion for a particular special purpose, or out and out, but the produce to be applied for a particular purpose; when the purpose fails, the intention fails; and a court of equity regards him as not having directed the conversion. *Ripley v. Waterworth*, 7 Ves. 435. Et vid. *Townley v. Bedwell*, 6 Ves. 194. In cases of

wills, therefore, as in deeds, it is important to consider, whether the testator meant to give to the produce of the real estate the quality of personality, *to all intents*, or only so far as respected the *particular purposes* of the will; for unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personality for the purposes of the will, but further, that the produce of the real estate shall be taken as personality, *whether such purposes take effect or not*, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will at the time of the testator's death (whether from the silence (*Collins v. Wakeman*, 2 Ves. 687.) or the inefficacy of the will itself, or from subsequent lapse), will result to the heir. See *Cruse v. Burley*, 3 P. Wms. 22. n. 1. and the cases there cited. Et vid. *Randall v. Bookey*, 2 Vern. 425. *Stonehenge v. Evelyn*, 1 P. Wms. 253. *Ackroyd and Smithson*, 1 Bro. C. C. 502. *Robinson and Taylor*, 2 Bro. C. C. 589. S. C. 1 Ves. jun. 44. *Kennel v. Abbot*, 4 Ves. 810. *Stansfield v. Habergham*, 10 Ves. 278. *Williams and Coade*, 10 Ves. 500. *Berry v. Usher*, 11 Ves. 87. *Gibbs and Ougier*, 12 Ves. 415. *Hooper v. Goodwin*, 18 Ves. 156. *Hill v. Cock*, 18 Ves. 174. *Chambers v. Brailsford*, 18 Ves. 369. *Gibbs v. Rumsey*, 2 Ves. & B. 294. If the intention is to convert it into personal property, for all the purposes of the will, though some of those purposes should fail, and, though in consequence of that failure part results to the heir, it would result to him as personal estate, and be so considered in a question between his representatives. 16 Ves. 191. Et vid. *Hewitt and Wright*, 1 Bro. C. C. 86. *Kidney v. Cousmaker*, 2 Ves. jun. 268. 2 Mad. Ch. 110, 111. If a sum of money be devised in trust to be laid out in land, and the uses to which the land should go are not declared, the benefit of that money, it seems, will go to the heir at law, as a resulting trust. *Hayford v. Benlows*, Amb. 582. Sp on the other hand, if a real estate be devised to be sold, and no particular directions are given how the purchase money should be applied, in whole or in part, the money undisposed of, will, it seems, go to the executor, to be applied in a course of distribution, or to a residuary legatee of the personal estate, if any such there be. Ibid. 583. So where a testator creates an executory trust, or devise, to take effect within the limit allowed by law, and makes no disposition of the intermediate beneficial interest, the trust or equitable estate will descend to the heir, until the contingency happens, upon which the equitable executory devise is to arise. 1 Sand. 263. Fearn. Ex. Dev. 537. *Hopkins v. Hopkins*, 1 Atk. 584. S. C. Fort. 44. and in MS. *Attorney-General v. Bowyer*, 3 Ves. 725. *Stanley v. Stanley*, 16 Ves. 491. Thus, on a devise of an estate to a person, when he attains twenty-one, there results a trust for the heir until that period; and by the previous death of the devisee the remainder will be accelerated. *Chambers v. Brailsford*, 18 Ves. 368. But upon a devise to a good charitable use, the heir has no right to the rents and profits accrued before the use is carried into effect. *Attorney-General v. Bowyer*, supra. In case there be a devise of real estate for payment of debts, and nothing more is meant than to make a provision for the debts, all beyond what is required for that purpose, will remain real estate, and as such go to the heir. *Wright and Wright*, 16 Ves. 191. *Hill v. Cock*, 18 Ves. 174. *King v. Denison*, 1 Ves. & B. 272. *Southouse v. Bate*, 2 Ves. & B. 396; the general principle being, that the heir takes all that, which is not for a defined and specific purpose given by the will, *Chitty v. Parker*, 2 Ves. jun. 271. But although, where the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interests as is not exhausted, belongs to the heir; yet where the whole legal interest is given for a particular purpose, with an intention to give to the devisee of the legal estate the beneficial interest, as, for instance, if one gives to A. and his heirs all his real estate, *charged with his debts*; in this case, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, it being intended to be given to him. *King v. Denison*, 1 Ves. & B. 272, 273. It may be further observed, that, though voluntary conveyances may be good and effectual, yet circumstances of fraud, mistake, or the like, may convert a grantee under a voluntary conveyance, into a trustee. *Duke of Norfolk v. Browne*, Prec. Ch. 80. 1 Eq. Abr. 381. 1 Freem. 305—308. 2 Atk. 150. And wherever any fraud is committed in obtaining a conveyance, the grantee in such conveyance will be considered in equity as a trustee for the real owner. Fearn. Cont. Rem. 479. And it is a rule in equity, that all persons coming into possession of property bound by a trust, with notice of the trust, shall be considered as trustees, *Daniel v. Dawson*, 16 Ves. 249. *Adair v. Shaw*, 1 Sch. & Lef. 262; though they take by fine. *Kennedy v. Daly*, 1 Sch. & Lef. 379. And if a purchaser has notice of the trust before the execution of the conveyance, he is bound, though he had no notice when he paid his money. *Wigg v. Wigg*, Atk. 384. But where a man by deed or will charges, or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application. *Jenkins v. Hiles*, 6 Ves. 654. n. Where a person purchases an estate, which he sees himself has a defect upon the face of the deeds, yet a fine will be a

bar, and notice will not affect him so as to make him a trustee for the person who has the right; for the defect upon the face of the deed is often the occasion of fines being levied. *Story v. Lord Windsor*, 2 Atk. 631. A fine and non-claim to or by a person, having notice of the trust, will not bar the cestui que trust. A mortgagee, therefore, cannot by fine and non-claim bar the equity of redemption. *Kennedy v. Daly*, 1 Sch. & Lef. 380. *Story v. Windsor*, supra. But it is not clear, how far a purchaser may be affected by a constructive or doubtful trust. See 1 Sand. 356. *Warwick v. Warwick*, 3 Atk. 293. *Senhouse v. Earl*, Ambl. 285. *Cordwell v. Mackaril*, Ambl. 515. *Hardy v. Reeves*, 5 Ves. 426. *Parker v. Brooke*, 9 Ves. 583. Where a vendor conveys his estate to the vendee, without receiving all or part of the consideration money, he has, as against the vendee and his heir, (*Hughes v. Kearney*, 1 Sch. & Lef. 135), and all persons claiming as volunteers, or purchasers for a valuable consideration, with notice, a lien upon the estate for the whole, or such part of the purchase money, as was not paid, *Chapman v. Tanner*, 1 Vern. 267. *Walker v. Prestwick*, 2 Ves. 692; and this, though the consideration is upon the face of the instrument expressed to be paid, and a receipt indorsed. *Coppin v. Coppin*, 2 P. Wms. 294. *Fawell v. Heelis*, Ambl. 726. S. C. 1 Dick. 485. *Cator v. Earl of Pembroke*, 1 Bro. C. C. 302. *Mackreth v. Symons*, 15 Ves. 337—349. Nor does the bankruptcy of the vendee affect the lien of the vendor. *Chapman v. Tanner*, supra. Sed vid. Ambl. 726. So, on the other hand, if the purchaser of an estate, prematurely pays the purchase money, before the estate is conveyed to him, the money will be considered as a lien on the estate in the hands of the vendor for the vendee, or in case of his death, for his personal representatives, 15 Ves. 345. 1 Sch. & Lef. 135. The rule, however, is confined merely to the vendor and vendee, and will not extend to a third person. *Pollerfen v. Moore*, 3 Atk. 272. And in all these cases; if by the contract or other circumstances (as where a special security is given for the purchase money, a pledge of stock for instance, *Nairn v. Prowse*, 6 Ves. 752, or a mortgage of another estate of the vendee, lb. 760, or where the vendor takes a bond for the consideration money, *Fawell v. Heelis*, Ambl. 724. S. C. 1 Dick. 485), it is evident that a lien by implication was not intended to be reserved, a lien cannot be claimed. 3 Atk. 347. Et vid. *Austen v. Halsey*, 6 Ves. 483. 2 Mad. Ch. 106.

With respect to the rules by which trust estates are governed, a trust estate is considered as equivalent to the legal ownership, and is regulated in the same manner as the legal estate. 1 Ves. 357. And the cestui que trust has, in most respects, the same power over the trust estate, as owners of legal estates are possessed of; and by the stat. 7 W. 3. c. 25. s. 7. he is allowed to vote at elections for knights of the shire. A trust estate may be aliened by the cestui que trust; and any legal conveyance or assurance by him has the same effect and operation upon the trust, as it would have had, at law, upon the legal estate. *North v. Champenon*, 2 Ch. Cas. 63—78. *Bottler v. Allingham*, 1 Bro. C. C. 72. But when the owner of an equitable interest cannot, if such equitable interest were converted into a legal estate, convey it without the aid of a fine or recovery, he must use the same kind of assurance by matter of record in the transfer of his beneficial interest, as if it had been a legal estate; and therefore the equitable rights of tenant in tail, and married women, must be conveyed by fine or recovery. 1 Sand. 273. A common recovery suffered by a cestui que trust in tail, in possession, bars all equitable remainders depending upon such estate tail although there was no legal tenant to the præcipe. *North v. Way*, 1 Vern. 13. *Barnaby v. Griffith*, 3 Ves. 276, 277. *Wykham v. Wykham*, 18 Ves. 418. But it is a general rule, that where the tenant against whom the writ in a common recovery is brought, has only an equitable estate of freehold, the recovery suffered upon that equitable freehold, cannot bar a legal estate tail vested in the vouchee, or any legal remainder, *Shapland v. Smith*, 1 Bro. C. C. 74. *Robinson v. Cumming*, 1 Atk. 473. *Phillips v. Brydges*, 3 Ves. 120. 1 Prest. Conv. 22: but an equitable recovery is good, although the equitable tenant to the præcipe has the legal estate, Sugd. Vend. 287. 1 Prest. Conv. 23; and it is no objection that the equitable remainder is in the trustee of the legal estate. Ibid. *Brydges v. Brydges*, supra. *Wykham v. Wykham*, supra. Trust estates also are devisable by the cestui que trust, *Greenhill v. Greenhill*, 2 Vern. 680; and where they are not devised, they descend in the same manner as legal estates do, whether customary (as borough English or gavelkind), or otherwise, *Banks v. Sutton*, 2 P. Wms. 713. *Fawcet v. Lowther*, 2 Ves. 304. Et vid. 2 P. Wms. 736: and there may also be a *possessio fratris* of a trust (2 P. Wms. 713—736.), as by the common law, there was of an use. *Corbet's case*, 1 Co. 88. Trust estates also are intailable; and such intail, we have seen, can only be barred by a fine or recovery, which will have the same effect upon a trust estate as upon a legal one. *Kirkman v. Smith*, Ambl. 518. 2 P. Wms. 133. Supra. So a trust estate may be limited to a person for life; and, in such case, a fine, or other assurance by the cestui que trust for life, will not operate as a forfeiture of his estate, *Lethiculier v. Tracy*, 3 Atk. 728. *Whetstone v.*

Bury, 2 P. Wms. 146; nor will such fine, or conveyances by him, destroy any contingent remainders expectant upon his life estate. 1 Ves. 27. So trust estates are subject to curtesy, *Watts v. Ball*, 1 P. Wms. 108. *Chaplin v. Chaplin*, 3 P. Wms. 234. *Casborne v. Scarfe*, 1 Atk. 603; unless where the husband is excluded by an express trust for the separate use of his wife. *Hearle v. Greenbank*, 3 Atk. 695. 716. 1 Ves. 298. But although a trust estate of inheritance is subject to curtesy, it is not liable to dower. *Colt v. Colt*, 1 Ch. Rep. 254. *Bottomley v. Fairfax*, Prec. Ch. 336. *Goodwin v. Winsmore*, 2 Atk. 525. *Dixon v. Saville*, 1 Bro. C. C. 326. At the common law, a trust estate in fee-simple, or in tail, was not forfeited to the crown by the attainder of cestui que trust for treason, Jenk. 190. Hardr. 495; but the stat. 33 H. c. 20. s. 2. (which extends to all manner of treasons, 2 Co. 11 a.), includes trust estates, (Hardr. 495), and also extends to an equity of redemption. *Attorney-General v. Crofts*, 4 Bro. P. C. 136. It is said, that a cestui que trust of a term for years forfeits it for felony, and upon an outlawry in a personal action. *Earl of Somerset's case*, Hob. 214. Jenk. 190. Hard. 490. But a trust estate of inheritance will not escheat to the lord upon the attainder of cestui que trust for felony, or for want of heirs, because upon the attainder or death the trust is absolutely determined. *Burgess v. Wheate*, 1 Black. Rep. 128. *Sandy's case*, Hardr. 408. Trust estates also are subject to an extent, Hardr. 495; and by the statute of Frauds, 29 Car. 2. c. 3. s. 10, they are made liable to executions upon judgments, statutes, and recognizances: but the statute does not authorize either the trust, (*Scott v. Scholey*, 8 East. 467), or the equity of redemption of a term for years, to be taken in execution. *King v. Marissal*, 3 Atk. 192. *Burden v. Kennedy*, 3 Atk. 739. *Lyster v. Dolland*, 1 Ves. jun. 431. From the case of *Hunt v. Colz*, Com. Rep. 226, it appears, that under this statute a judgment is not a lien upon the trust estates; and, therefore, that a purchaser for a valuable consideration and without notice, obtaining a conveyance of the legal estate from the trustee, and of the equitable interest from the cestui que trust, will not be bound by a judgment previously entered up against the cestui que trust. 1 Sand. 220. So trust estates are, by the statute of Frauds, made legal assets to satisfy bond debts. See *King v. Ballet*, 2 Vern. 248. *Robinson v. Tong*, 3 Vin. 145, pl. 28. But an equity of redemption not being considered a trust within the statute, has therefore been determined to be equitable, and not legal assets. *Punket v. Penson*, 2 Atk. 290. The trust of a term for years also is equitable assets, *King v. Ballet*, supra; except in the case of a term for years attendant upon the inheritance, in which case the term becomes consolidated in equity with the freehold. 2 Ch. Ca. 152, in *Ratcliff v. Graves*, 35 Car. 2. 1 Sand. 221. Trust estates are subject to merge in the legal estate, whenever both estates come to the same person. Dougl. 336. Ante, p. 562. n. (x). And if an equitable title is not acted upon in the same time the legal should, it is barred, by analogy to the statute of Limitations. *Medlicot v. O'Donnell*, 1 Bro. C. C. 167. *Hovendon v. Lord Annesley*, 2 Sch. & Lef. 630. *Bonny v. Ridgard*, 4 Bro. C. C. 138. *Andrew v. Wrigley*, 4 Bro. C. C. 125. *Townsend v. Townsend*, 4 Bro. C. C. 138. *Beckford v. Wade*, 17 Ves. 87. 97. 15 Ves. 496.

With regard to the rules by which trust terms are governed, terms for years are either vested in trustees for the use of particular persons, or for particular purposes, or else upon trust to attend the inheritance. In the first case, they are called *terms in gross*, and the persons entitled to the beneficial interest, have a right, in equity, to call on the trustees, or persons who have the legal interest in the term, for the rents and profits of the lands, and also for an absolute legal assignment of the term. In the latter case, they are called *terms attendant on the inheritance*. Although the trust of a term for years in gross cannot be so limited, as to make it descendible as real estate; yet when the cestui que trust of the term is also the beneficial owner of the immediate inheritance in fee-simple, the equitable interest in the term will become, by analogy to the doctrine of merger, consolidated with the inheritance, and will follow the limitations of it. *Best v. Stamford*, Prec. Ch. 252. S. C. 2 Freem. 288. It will belong to the heir or devisee, 3 Cha. Rep. 37; it will be real assets, 2 Ch. Ca. 152, supra; it will, as against the heir, (*Wray v. Williams*, Prec. Ch. 151. 1 P. Wms. 137), or assignees of a bankrupt, (*Square v. Compton*, 9 Vin. 227, pl. 60), be subject to dower, and for the same reason to curtesy; it will not be forfeited for the felony of cestui que trust, *Attorney-General v. Sundys*, Hardr. 488. 3 Cha. Rep. 33; and it will not pass by a will not attested by three witnesses. *Whitchurch v. Whitchurch*, 2 P. Wms. 236. 1 Sand. 229. A term may become attendant upon the inheritance, without any express declaration for that purpose, either where the legal interest in the term is vested in the trustee, and the legal freehold in the owner of the inheritance; or where the owner is beneficially or equitably entitled to the inheritance, and is legally possessed of the term; or where the legal estate, both of the term and the inheritance, is vested in trustees. See *Cooke v. Cooke*, 2 Atk. 67, and notes to the last edition. Collect. Jur. 273. But although a term may become attendant upon the inheritance, yet the beneficial owner may destroy the equitable

union; and where it appears to have been his intention to separate the term for years from the inheritance, it will then be considered as a term in gross. *Hayter v. Rod*, 1 P. Wms. 362. 1 T. R. 770. Ante, p. 562, n. (κ). It remains to observe, that although a term be attendant in equity upon the inheritance, it is at law always considered as a term in gross: and therefore a person purchasing the inheritance, and taking an assignment of a satisfied term in the name of a trustee, will, by means of the term, protect himself against intervening incumbrances, of which he has no notice. (*Willoughby v. Willoughby*, 1 T. R. 763. *Goodtitle v. Jones*, 7 T. R. 47, except debts due to the crown, *King v. Smith*, Sugd. Vend. 536,) and against the dower of the vendor's wife, notwithstanding he has notice of it. *Wynn v. Williams*, 5 Ves. 130—134. But in these cases, the purchaser must obtain the actual assignment of the term to his trustee. *Maundrell v. Maundrell*, 7 Ves. 567. 10 Ves. 246. 1 Sand. 234. Ante, vol. 1. p. 618. n. (α 1). That an unsatisfied term outstanding in trustees will bar an ejectment by the heir at law, even though he claim only subject to the charge, see *Doe v. Staple*, 2 T. R. 684; for it is a rule of law, that the plaintiff in ejectment must recover upon a legal title, *Goodtitle v. Jones*, 7 T. R. 43—47. *Doe v. Wharton*, 8 T. R. 2. *Doe v. Luxton*, 6 T. R. 289; no equitable title whatever will avail; and this principle is so fixed and immutable, that a trustee may maintain ejectment against his own cestui que trust. *Roe v. Read*, 8 T. R. 118. Adam. Eject. 36.

With respect to the persons who may be trustees, and their powers and duties;—when trusts were first introduced, it was held, that none but those who were capable of being seised to a use, could be trustees. But it is now settled, that the king, (*Kildare v. Eustace*, 1 Vern. 439. 1 Ves. 453. 3 Atk. 309), or a corporation, (1 Ves. 467, 468—536. 2 Vern. 412), may be a trustee; and where an estate was devised to the separate use of a *feme covert*, without the intervention of trustees, it was determined, that the husband should be a trustee for his wife. *Bennett v. Davies*, 2 P. Wms. 316. 2 Ves. 665. It has also been determined, that when once a trust is sufficiently created, it will fasten itself upon, and attach to the land intended to be made subject to it, and shall never fail on account of the disability or non-appointment of the trustee. *Moggridge v. Thackwell*, 3 Bro. C. C. 517. Therefore, where a devise of an estate to a corporation in trust, was void by the statute of Mortmain, it was decreed, that the heir at law was a trustee to the uses of the will. *Sonley v. Clockmaker's Company*, 1 Bro. C. C. 81.—The power of the trustee over the legal estate, vested in him, exists only for the benefit of the cestui que trust. He may indeed, if in the actual possession of the estate (which rarely happens), prejudice the cestui que trust, by alienating the estate, either wholly, or partially, (as in the case of a mortgage) to a purchaser, for a valuable consideration, (see *Pye v. George*, 1 P. Wms. 128. *Saunders v. Dehew*, 2 Vern. 271. *Daniels v. Davisons*, 16 Ves. 249), without notice. *Snagg's case*, cited 2 Freem. 43. pl. 47. 1 P. Wms. 278, 279. But a judgment against the trustee, or a commission of bankruptcy against him, will not, in equity, affect the estate, *Finch v. Earl of Winchelsea*, 1 P. Wms. 278. *Bennett v. Davis*, 2 P. Wms. 318. 3 P. Wms. 187. *Medley v. Martin*, Finch. 63; and it will be protected in equity from the dower and free-bench of his wife, *Hinton v. Hinton*, 2 Ves. 634—638. *Noel v. Jevon*, 2 Freem. 43. *Bevant v. Pope*, 2 Freem. 71; and from the tenancy by curtesy of the husband of a female trustee. *Casborn v. Inglis*, 7 Vin. Abr. 157. It has been doubted whether a trustee will, by treason or felony, forfeit the trust estate; and whether, supposing a forfeiture, the lord who claims by escheat, or the crown claiming by that title, is bound by the trust, see Com. Dig. tit. Forfeiture, B. 1. *Wike's case*, Lane, 54. Jenk. 190. Cas. 92. Hardr. 466. Brooke, Feoffment al. Uses, pl. 31. Vin. Abr. Uses, pl. 4. *Geary v. Bearcroft*, Cart. 67. *Eales v. England*, Prec. Ch. 200. 1 Eq. Abr. 384, n. *Burgess and Wheate*, 1 Bl. Rep. 123. 2 Fonbl. Eq. 168, n. 1 Mad. Ch. 364. 1 Sand. 280; but since the late statute, 39 & 40 G. 3. c. 88. s. 12, (ante, p. 194, n. (15).) it is not probable, that a question will arise, in the case of the king, either upon the felony, or treason of a trustee. The case of a subject, claiming as lord by escheat, is more doubtful. See 1 Sand. 281. If a trustee devises all the real estates, of which he is seised, to A. and his heirs generally; the legal estate, of which he is trustee, will pass to the devisee, subject to the original trust. *Braybrooke v. Inskipp*, 8 Ves. 417. *Marlow and Smith*, 2 P. Wms. 200. But though, even under general words, (*Marlow v. Smith*, 1 P. Wms. 97. 1 Atk. 605, n.) the trust estate may be so devised, yet wherever the real estate of the trustee is devised for purposes, or under limitations, inconsistent with the supposition that the trust estate was meant to be included in the devise, it will be presumed they were not intended to pass, and the devise will not include the trust property. See *Duke of Leeds v. Munday*, 3 Ves. 348. *Ex parte Sargeant*, 4 Ves. 147. *Attorney-General v. Buller*, 5 Ves. 339. *Ex parte Brettell*, 6 Ves. 577. *Attorney-General v. Vigor*, 8 Ves. 276. *Braybrooke v. Inskipp*, supra. *Ex parte Morgan*, 10 Ves. 433. *Reade v. Reade*, 8 T. R. 118. Trustees incapacitated, as infants, idiots, and lunatics,

and their committees, are enabled, under the direction of the lord chancellor, to convey lands vested in them by way of trust or mortgage, see stat. 7 Ann. c. 19, cited ante, vol. 1. p. 174. n. (35), and stat. 4 Geo. 2. c. 10, cited ante, p. 214. n. (12); and the stats. 39 & 40 G. 3. c. 88. s. 12, and 47 Geo. 3. s. 2. c. 24, before mentioned, have authorized the king to direct the execution of any trusts affecting lands, which have become vested in him in consequence of escheat, forfeiture, or otherwise. Trustees, we have seen, cannot, without an express power for that purpose, alter the nature of the trust property, so as to vary the right of succession to that property, ante, vol. 1. p. 182. n. (P). Et vid. *Easom v. Sanders*, Ambl. 241. *Rook v. Worth*, 1 Ves. 461. *Tullit v. Tullit*, Ambl. 370; unless it be under particular circumstances, and evidently for the benefit of the trust estate. *Terry v. Terry*, Prec. Ch. 273. *Vernon v. Vernon*, cited 3 Bro. C. C. 513. *Inwood v. Twine*, Ambl. 417. And when money is invested in the purchase of stock in the name of trustees, they cannot change the security, without an express power for that purpose. *Harrison v. Harrison*, 2 Atk. 121. *Bostock v. Blakeney*, 2 Bro. C. C. 658. *Pocock v. Reddington*, 5 Ves. 794. The laches of the trustee, in not entering to avoid a fine levied by a stranger during the infancy of cestui que trust, will not prejudice cestui que trust, *Allen v. Sayer*, 2 Vern. 368. Et vid. *Willan v. Willan*, 2 Dow. 281; though, we have seen, it is otherwise in the case of a fine levied by the trustee to a purchaser without notice. Supra, p. 598. Gilb. Ch. 62. Trustees have all equal power and interest, and must all join both in conveyances and receipts; but it is a rule, that each of them shall be charged for his wilful neglect, default, or breach of trust only; and that the innocent trustee shall not suffer for the misconduct of his co-trustee: therefore, although two trustees join in a receipt, where the money is in fact paid to one of them, yet the trustee who actually received the money will only be accountable, 1 P. Wms. 82 n. 3 Bro. C. C. 80; unless, indeed, fraud, or what is tantamount to it, gross negligence, should appear in the transaction. See Bridgm. 38. *Keble v. Thompson*, 3 Bro. C. C. 112. *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252. S. C. 16 Ves. 477. *Underwood v. Stevens*, 1 Meriv. 712. Trustees are not allowed to derive any benefit from a trust; and therefore if a trustee compounds a debt, or buys it for less than is due on it, the trust estate shall derive the benefit of the composition. 3 P. Wms. 251 n. *Darcy v. Hall*, 1 Vern. 49. *Morrett v. Packe*, 2 Atk. 54. Et vid. *Phayre v. Perce*, 3 Dow. 128. *Mucklow v. Attorney-General*, 4 Dow. 12. 16. *Montgomery v. Wauchope*, 4 Dow. 109, 110. But where a trustee releases or compounds a debt, if it appears to have been done for the benefit of the trust estate, the trustee will be excused. *Bhuc v. Marshall*, 3 P. Wms. 381. A trustee is not permitted to become a purchaser (even at a sale by auction) of part, or the whole, of the trust estate, on account of the dangerous consequences that might ensue from such a practice. *Whelpdale v. Cookson*, 1 Ves. 9. 5 Ves. 682. Et vid. *Whitchate v. Lawrence*, 3 Ves. 740. *Campbell v. Walker*, 5 Ves. 678. *Ex parte Reynolds*, ib. 707. *Ex parte Hughes*, 6 Ves. 617. *Ex parte Lacey*, ib. 625. *Lister v. Lister*, ib. 631. *Coles v. Trecothick*, 7 Ves. 234. *Ex parte James*, 8 Ves. 337. *Ex parte Bennett*, 10 Ves. 393. *Sanderson v. Walker*, 13 Ves. 602. *Cane v. Lord Allen*, 2 Dow. 300; and whether the bargain be advantageous or not, the sale is, in every instance, bad. *Ex parte Bennett*, 10 Ves. 385. Commissioners (*Ex parte Hughes*, 6 Ves. 617. 12 Ves. 6), assignees, (*Ex parte Lacey*, 6 Ves. 627. *York Buildings Company v. Mackenzie*, 8 Bro. P. C. ed. Toml. 42), and solicitors, under a commission of bankruptcy, whether bidding for themselves or others, are within the operation of this rule, and are not allowed to purchase the bankrupt's estate. So a committee is not allowed to buy the lunatic's estate, 1 Mad. Ch. 91; nor, it seems, can an executor purchase his testator's effects. *Burden v. Burden*, 18 Ves. 176. Governors of a charity, for the same reason, are not allowed to take leases of the charity lands, *Attorney-General v. Lord Clarendon*, 17 Ves. 500; and the rule is applied as between principal and steward, (*Ormond v. Hutchinson*, 13 Ves. 47. *Beaumont v. Boulbee*, 5 Ves. 485. 7 Ves. 509. 11 Ves. 358), and also to an agent, *Louth v. Louth*, 13 Ves. 95. *Watt v. Grove*, 2 Sch. & Lef. 492. Sed vid. *Garthside v. Isherwood*, 1 Bro. C. C. 558; but not as between mortgagor and mortgagee. See 2 Sch. & Lef. 673. 1 Mad. Ch. 91. But though the rule be, that a trustee cannot purchase from himself, he is allowed to purchase from his cestui que trust, provided there is a distinct and clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and there is no fraud, no concealment, no advantage taken by the trustee, of information acquired by him in that character. *Coles and Trecothick*, 9 Ves. 246. *Morse and Royal*, 12 Ves. 373. *Fox v. Mackreth*, 2 Bro. C. C. 400. *Saunders v. Walker*, 13 Ves. 601. Where trustees are guilty of a breach of trust, the court of chancery will compel them to reimburse the cestui que trust for any loss which he may have sustained. *Lord Montford v. Lord Cadogan*, 17 Ves. 485. S. C. 2 Meriv. 3. And the court will charge their representatives with the consequence of the breach of trust; whether they derive benefit from the breach of trust,

(604)*

CHAP. XLIV.*

OF ALIENATION BY MATTER OF RECORD. (A)

120 b.

Definition
and nature of
a fine.
Vid. sect. 441.
194. 174. 74.
(a) Bract. lib.
5. Tract. 5.
c. 28. (Post,
282 a.)
(b) Glanv.
lib. 8. cap. 1.

FINE, is in Latin, *finis*. (a) *Ideo dicitur finalis concordia; quia imponit finem litibus, et est exceptio peremptoria.* *(b) *(606)

or not. S. C. *Scurfield v. Howes*, 3 Bro. C. C. 90. *Adair v. Shaw*, 1 Sch. & Lef. 243. And in cases of breach of trust, there is no analogy to the statute of Limitations. *Attorney-General v. Brewer's Company*, 1 Meriv. 495. Ante, vol. 1. p. 168. n. (c). And if a trustee conceals any act done by his co-trustee, which amounts to a breach of trust, he will thereby make himself equally liable. *Boardman v. Mossman*, 1 Bro. C. C. 68. But the cestui que trust is considered, even in equity, but as a simple contract creditor, in respect of such breach of trust; unless the trustee has acknowledged the debt under hand and seal. 2 Atk. 119. Fonbl. 109. 1 Cru. Dig. 555. And although a trustee for the purchase of land, should buy land, it will not be liable to the trust, unless there are circumstances affording a presumption, that it was purchased in execution of the trust. *Perry v. Philips*, 4 Ves. 108. But where trust money can be traced into a purchase of land, the land in general is liable, and a claim of that nature may be supported by parol evidence. *Lench v. Lench*, 10 Ves. 517. *Lane v. Dighton*, Ambl. 409. Sed vid. *Kendar v. Miward*, 2 Vern. 440. S. C. Prec. Ch. 172. *Ryall v. Ryall*, 1 Atk. 59. *Phayre v. Perez*, 3 Dow. 116. Trustees are not liable for accidental losses, if such losses do not happen through their own neglect or default. See *Morley v. Morley*, 2 Ch. Ca. 2. *Jones v. Lewis*, 2 Ves. 240. *Knight v. Plymouth*, 3 Atk. 480. *Horsley v. Challoner*, 2 Ves. 85. *Ex parte Belchier*, Ambl. 219. And if a trustee proceeds *bona fide* in the trust, he is not to suffer for mistake, unless there has been very gross ignorance and miscarriage. Per Lord Eldon, C. *Montgomery v. Wauchope*, 4 Dow. 130. But it is a rule, that a trustee shall have no allowance for his care and trouble in the management of the trust, *Robinson v. Pett*, 3 P. Wms. 251. *French v. Baron*, 2 Atk. 120, n. In the matter of *Annesley*, Ambl. 78. *Chambers v. Goldwin*, 5 Ves. 884. 9 Ves. 254; though it seems, that if he employ a bailiff to manage the trust estate, he will be allowed for the payments made to such bailiff. *Bonithorn v. Hockmore*, 1 Vern. 316. Trustees are, however, allowed all costs and expenses which have been incurred in the execution of the trust, provided there has been no mismanagement, nor breach of trust, *Hitherevell v. Hales*, 2 Ch. Rep. 158. *Amand v. Bradburn*, 2 Ch. Ca. 138: and it is a rule, that the cestui que trust ought to save the trustee harmless as to all damages relating to the trust. 2 P. Wms. 455. Lastly, where a trustee refuses to accept a trust, the usual practice is, to procure him to release all his estate and interest to the other trustees, *Travel v. Danvers*, Rep. Temp. Finch. 380; or on an application to the court of chancery, the court will either appoint a new trustee, or take upon itself the execution of the trust. *Uvedale v. Ettick*, 2 Ch. Ca. 20. *Lake v. De Lambert*, 4 Ves. 592. *Buchanan v. Hamilton*, 5 Ves. 722.—[Ed.]

(A) The nature and operation of deeds entered into by private persons, which derive their effect from the consent of the contracting parties, having been explained, we now come to consider those assurances which are effected by matter of record; that is, where the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one person to another. Of these there are four kinds, 1. Private acts of parliament; 2. The king's grants; 3. Fines; 4. Common recoveries.

1st. Private acts of parliament. These are now a very common mode of assurance, adopted in cases where the parties are not capable of substantiating their agreements without the aid of the legislature; and where the carrying such agreements into effect is evidently beneficial to the parties. Private acts of parliament are frequently obtained where a tenant for life, with remainder to his first and other sons in tail, under a will or settlement, has either no children, or has children under age, and is desirous of settling the estate on some eligible opportunity, and to lay out the money in other lands to be settled to the same uses; or where he has an opportunity of making an advantageous exchange with another person; or where a settled estate is charged with the payment of a considerable sum of money, and the parties wish to sell the same to pay off the debt, and to lay out the surplus

Finis est amicabile compositio et finalis concordia, ex consensu

in the purchase of other lands to be settled to the same uses; or where a tenant for life has no power of making long leases, and it would be advantageous to the estate, if it could be left for a long term of years; or where a tenant for life has expended his own money in making improvements which will be beneficial to the inheritance, or is desirous of making such improvements; in these and many other cases, private acts of parliament may be obtained.

Acts of this kind are carried on, in both houses, with great deliberation and caution; in the house of lords, they are usually referred to two judges to examine and report the facts alleged (which must be proved before them in the same manner as on trial in ejectment, 4 Cru. Dig. 517.), and to settle all technical forms. The consent of all parties in being and capable of consenting, who have the remotest interest in the property affected by the bill, is expressly required to every private act; unless such consent appears to be perversely, and without any reason withheld. 2 Bl. Com. 345. And where infants, or other persons not *in esse*, or incapable of acting for themselves, are to be bound, a full equivalent must be settled upon them in lieu: and, in general, the legislature will not suffer the property of infants, or other persons incapable of acting for themselves, to be altered by a private act, unless it appears that they will be benefited by such alteration. And a general saving is now constantly added, at the close of the bill, of the rights and interests of all persons whomsoever, except those whose consent is so given or purchased, and who are therein particularly named, 2 Bl. Com. 345: though it has been holden, that, even if such saving be omitted, the act shall bind none but parties. 1 Co. 138 a. *Barrington's case*, 8 Co. 136. S. C. Godb. 167. *Lucy v. Levington*, 1 Vent. 176. But where a private act is obtained by a tenant in tail, it will bar the estate tail and all remainders, and the reversion depending on it, although the persons in remainder or reversion should not give their consent to the act, 2 Cas. & Op. 400. 4 Cru. Dig. 520; and although the rights of the remainder-man were not excepted in the saving. *Westby v. Kierman*, Amb. 697. But where a tenant for life enters into an agreement to convey the fee-simple, and a private act is passed for establishing such agreement, in which is a saving of the rights of all persons not parties to the act, it will not affect the persons entitled to the remainder expectant on the life estate. *Provost of Eton v. The Bishop of Winchester*, 3 Wils. 483. Private acts are construed in the same manner as common law conveyances; and, therefore, when any doubt arises as to the construction of a private act, the court will consider what was the object and intention of the parties in obtaining the act, and endeavour, if possible, to give effect to that intention. 4 Cru. Dig. 526. Et vid. *Provost of Eton v. Bishop of Winchester*, supra. *Townley v. Gibson*, 2 T. R. 701. It has been already observed, that a saving in an act, which is repugnant to the body of the act, is void, ante, p. 545. n. (l 1). *Alton Wood's case*, 1 Co. 47 a; and in like manner it is held, that the general saving clause in a private act will control the provisions in the body of the act, but must be so expounded as to be consistent therewith, or else be void. *Wood v. Cecil*, 2 Vern. 711. *Westby v. Kierman*, supra. *Ridd v. White*, 4 Gwill. 1387. A private act may be relieved against, if obtained upon fraudulent suggestions, 2 Bl. Com. 346. 2 Hargr. Jur. Argum. 392. *Richardson v. Hamilton*, Canc. 8. 1773. *M'Kenzie v. Stuart*, Dom. Proc. 1754. *Biddulph v. Biddulph*, 4 Cru. Dig. 549; and it has been held to be void, if contrary to law and reason, 4 Co. 12; and no judge or jury is bound to take notice of it, unless the same be specially pleaded. Ante, vol. 1. p. 25. n. (16). As to the distinctions between public and private acts, see *ibid.* and as to the mode of passing private bills, and the standing orders of the house of lords relating thereto, see 4 Cru. Dig. 516, 517, 418. 553—563.

2d. The king's grants.—It is a rule of the common law, that the king cannot grant any lands, tenements, or hereditaments, but by matter of record; and therefore the king's grants are contained in charters or letters-patent, to which the great seal is annexed; and are usually directed or addressed by the king to all his subjects. Grants or letters-patent must first pass by bill, which is prepared by the attorney and solicitor-general, in consequence of a warrant from the crown. 2 Bl. Com. 346. All franchises in the hands of private persons, are, we have seen, derived from grants by the crown, ante, vol. 1. p. 236. n. (z 1); and the crown may still grant fairs, market, parks, warrens, &c. though such grants are now seldom made. 4 Cru. Dig. 564. There are also a variety of offices held immediately under the crown, which can only be granted by letters-patent, and with all their ancient rights and privileges. Ante, vol. 1. p. 236. n. (z 1). With respect to the restrictions upon grants of lands by the crown, see stats. 1 Ann. st. 1. c. 7. 34 Geo. 3. c. 75. 48 Geo. 3. c. 73. 53 Geo. 3. c. 161. 55 Geo. 3. c. 190. whereby all future grants or leases from the crown, for any longer term than thirty-one years (see stat. 48. Geo. 3. c. 73. s. 3. which prohibits the future

et licentiâ domini regis, vel ejus justiciariorum (1). *(c) *Talis* *121 a.

(607)*

(c) 9 Co. cap.

2. Statut. de

modo levandi fines. Pl. Com. 357. (3 Co. 84. 8 Co. 51.) 5 Co. fol. 93. Teye's case.

(1) This, though a just description of fines, considered according to their original and still apparent import, yet gives a very inadequate idea of them in their modern application. In Glanvill's time they were really amicable compositions of *actual* suits. But for several centuries past, fines have been only so in *name*, being in *fact* fictitious proceedings, in order to transfer or secure real property, by a mode more efficacious than ordinary conveyances. What the superiority of a fine in this respect consists of will best appear, by stating the chief uses to which it is applied.— One use of a fine is *extinguishing dormant titles* by shortening the usual time of limitation. Fines, being agreements concerning lands or tenements solemnly made in the king's courts, were deemed to be of equal notoriety with judgments in writs of right; and therefore the common law allowed them to have the same quality of barring all, who should not claim within a year and a day. See Plowd. 357. Hence we may probably date the origin and frequent use of fines as feigned proceedings. But this puissance of a fine was taken away by the 34 E. 3. and this statute continued in force till the 1 R. 3. and 4 A. 7. which revived the ancient law, though with some change, proclamations being required to make fines more notorious, and the time for claiming being enlarged from *a year and a day to five years*. See 34 E. 3. c. 16. 1 R. 3. c. 7. 4 H. 7. c. 24. The force of fines on the rights of strangers being thus regulated, it has been ever since a common practice to levy them merely for better guarding a title against claims, which, under the common statutes of Limitation, might subsist, with a right of *entry* for twenty years, and with a right of *action* for a much longer time. Another use or effect of fines is barring estates tail, where the

more extensively operative mode by common recovery, is either unnecessary or impracticable. The former may be the case when one is tenant in tail with an immediate reversion or remainder in fee; for then none can derive a title to the estate, except as his *privies or heirs*, in which character his fine is an immediate bar to them. The latter occurs when one has only a remainder in tail, and the person, having the freehold in possession, refuses to make a tenant to the præcipe for a common recovery, which would bar all remainders and reversions; for, under such circumstances, all which the party can do is to bar those *claiming under himself* by a fine. How this power of a fine over estates tail commenced, has been *veraxa questio*. The statute *de donis*, after converting fees conditional into estates tail, concludes with protecting them from fines, there being express words for that purpose. But the doubt is, when this protection was withdrawn, whether by the 4 H. 7. or the 32 H. 8. It is a common notion, into which some of our most respectable historians have fallen, that the 4 H. 7. was the statute which first loosened entails; and thus opening the door for a free alienation of landed property, has been attributed to the deep policy of the prince then on the throne. See Hume's History, 8vo. ed. v. 3. p. 400. But this is an error, proceeding from a strange inattention to the real history of the subject. Common recoveries had been sanctified by a judicial opinion in *Taltarum's case*, as early as the twelfth of Edward the Fourth; and from them it was that entails received their death wound; for, by this fiction of common recoveries, into the origin of which we mean to scrutinize in some other place, every tenant in tail in possession was enabled to bar entails in the most perfect and absolute man-

granting of crown lands for life, though lands of the Duchy of Lancaster belonging to the king may be granted on building leases for ninety-nine years or three lives, by stat. 32 Geo. 3. c. 161. s. 1), are declared to be void; except leases for land for building, which may be granted for any term not exceeding ninety-nine years, from the date of making thereof, where the lessees agree to make erections of greater yearly value than the land, or where the greatest part of the yearly value of the premises consists of buildings, stat. 34 Geo. 3. c. 75. s. 3; and except leases of lands for gardens, &c. to be used with houses built either on crown lands or lands of other persons proprietors, which may be also granted for any term not exceeding ninety-nine years, to be computed from the date or making thereof, stat. 48 Geo. 3. c. 73. s. 1. 52 Geo. 3. c. 161. s. 3; so as there be reserved upon every such grant or demise such annual rent as shall be deemed by the lords of the treasury, &c. a reasonable consideration for every such demise or grant, without taking any fine for the same, stat. 34 Geo. 3. c. 75. s. 4. 52 Geo. 3. c. 161. s. 3; but a discretionary power is vested in the treasury to ascertain the consideration either in rent only, or partly in rent and partly in fine, in

concordia finalis dicitur, eò quòd finem imponit negotio, adeo

ner; whereas fines, even now, being only a *partial* bar of the issue of the persons who levy them, must in general be an inefficient mode. In respect to the 4 H. 7. it was scarce more than a repetition of the 1 R. 3. the only object of which indisputably was to repeal the statute made the 34 E. 3. in favour of non-claims, and against them to revive the ancient force of fines, but with some abatement of the rigor in point of time and other improvements, as we have already hinted; a provision of the utmost consequence to the security of titles. Accordingly Lord Bacon, whose discernment none will question, in his life of Henry the Seventh, commends the statute of the 4th of his reign, merely as if aimed at non-claims. Bac. Hen. 7. in Ken. Comp. Hist. 2d. ed. v. 1. p. 596. Nor indeed could there have been the least pretence to extend the meaning of the law further, if it had not been for some ambiguous expressions in the latter end of it. Like the 1 R. 3. after declaring a fine with proclamation to be an universal bar, it saves to all, except *parties*, five years to claim under the proclamation of it. But this saving did not suit the case of the issue in tail, or of those in remainder or reversion; because during the life of the immediate tenant in tail, these could have no right to the possession, and it was possible, that he might live more than five years from the proclamation of the fine. The framers of the 4 H. 7. foresaw this; and therefore like the 1 R. 3. it contains an additional saving of five years for all persons, to whom any title should come *after* the proclamation of the fine by force of any intail subsisting *before*; words, which as strongly apply to the issue of the tenant in tail levying a fine, as to those in remainder or reversion. Had therefore the 4 H. 7. stopped here, what the learned and instructive observer on our ancient statutes writes would be strictly just, that, instead of destroying estates tail, the statute expressly saves them. Barringt. on Ant. Stat. 2d edit. p. 337. But a subsequent part of the statute, in declaring how a

fine shall operate on such as have five years allowed, if they do not claim within that time, expresses, that they shall be concluded *in like form as parties and privies*; and another clause, in regulating who should be at liberty to aver against a fine *quod partes nihil habuerunt*, saves this plea for all persons, with an exception of *privies* as well as *parties*. From these two clauses, though the former of them was copied from the 1 R. 3. grew a doubt, whether the statute did not enable tenant in tail to bar his issue by a fine. The arguments for it were, that the issue were *privies* both in blood and estate; and that if the statute meant to bind them, when the tenant in tail had *not any estate in the land* at the time of the fine, it was highly improbable, there should be a different intention, when he really had one. 2 Show. 114. On the other hand it might be said, that, as the word *privies* in the statute *de modo levandi finis*, and in the 1 R. 3. was not deemed sufficient to reach the heir in tail, and to control the statute *de donis*, why then should the same word in the 4 H. 7. include them; more especially when it was considered, that it was as much the professed scope of the 4 H. 7. as it was of the 1 R. 3. to revive the operation of fines against non-claims, and that both contained the same express saving for persons claiming under intails: 2 Inst. 517. Pollexf. 502. By such contrariety of reasoning, the judges in the 19 H. 8. became divided in opinion; three holding, that the 4 H. 7. was not a bar to the issue, and four that it was. See 19 H. 8. 6 b. Dy. 2 b. pl. 1. Br. Abr. Fines, 1. 121. 123. Bro. N. C. 144. Pollexf. 502. To remove the doubt the legislature passed the 32 H. 8. by which the heirs in tail are expressly bound. 32 H. 8. c. 26. But the last-named statute, though entitled an exposition of the 4 H. 7. and though made to operate *retrospectively*, contained several exceptions, particularly one of fines of lands, of which the reversion is in the crown. Consequently room was still left for contesting the effect of the 4 H. 7. independently of the 32 H. 8. and in the

certain cases. See stat. 48 Geo. 3. c. 73. s. 25. And if any such lease or grant be made to take effect in reversion, then the term or estate thereby to be granted, together with the term or estate in possession, must not exceed the respective times above mentioned. By stat. 48 Geo. 3. c. 73. s. 28, 29. (amended by stat. 52 Geo. 3. c. 161. s. 2.) the chancellor, &c. of the Duchy of Lancaster, and the surveyor-general of the crown lands, with consent of the treasury, are empowered to exchange lands of the crown for lands of individuals; and they may pay or accept money for equalizing any such exchange. And by stats. 48 Geo. 3. c. 25. s. 11. and 52 Geo. 3. c. 161. s. 5. 54 Geo. 3. c. 170. s. 11. the lords of the treasury may alienate small parcels of crown lands intermixed with lands of individuals; but in all cases of such exchange or sale, the lands of the crown and that of individuals to be given in exchange, must be previously surveyed and valued on oath by practical surveyors, to be appointed by the commissioners of woods, &c. Stat. 52 Geo. 3. c. 161. s. 6. By stat. 34

*ut *neutra pars litigantium ab eo de cætero poterit rece-* (610)*

reign of Charles the Second a case arose, which made a discussion of the point almost unavoidable. It was the case of the Earl of Derby against one claiming under a fine by the earl's father, who was tenant in tail with reversion in the crown, and so within an exception in the 32 H. 8. Two points were made, of which the first was whether this fine, thus depending wholly on the 4 H. 7. was a bar to the issue in tail; and on adjournment of the case into the exchequer chamber, eight judges against three held, that the fine of tenant in tail was a bar to the issue before the 32 H. 8. great stress however being laid by those of this opinion on the exposition of the former by the latter. See Murray on the demise of the *Earl of Derby* against *Eyton and Price*, Pasch. 31 Cha. 2. in Scacc. T. Raym. 260. 286. 319. 338. Pollexf. 491. Skinn. 95. 2 Show. 104. T. Jo. 238. It is observable, that both Lord Keeper North, and Lord Chief Justice Saunders, the lateness of whose promotions prevented their publicly giving their opinions, concurred with the majority of the judges in the construction of the 4 H. 7. and further, that Pollexfen, who, as counsel, argued most ably for the Earl of Derby the issue in tail, afterwards declared his private sentiments to be against the earl on that statute. But it should be adverted to, that, though the majority of the judges were against Lord Derby on this point, they gave judgment for him on a secondary one, which was, that the entail, being of the gift of the crown, fell within the protection of the 34 H. 8. Therefore their opinion on the 4 H. 7. finally proved to be wholly extra-judicial. But we do not know of any case, in which the controversy has been again agitated. A third effect of fines in passing the estates and interests of married women in the inheritance of freehold of lands and tenements. Our common law bountifully invests the husband with a right over the whole of the wife's personalty, and entitles him to the rents and profits of her real estate during the coverture. It further gives him an estate for his own life in her inheritance, if the husband is actually in possession, and there is born any issue of the marriage capable of inheriting. But the same law, which confers so much

on the husband, will not allow her, whilst a feme covert, to enlarge the provision for him out of her property, or to strip herself of any claims which the law gives her on his. On the contrary, jealous of his great authority over her, and fearful of his using compulsion, it creates a disability in her to give her consent to any thing, which may affect her right or claims after the coverture, and makes all acts of such a tendency absolute nullities. By the rigour of the ancient law, we take this rule to have been so universally applicable, that a married woman could in *no* case bind herself or her heirs by any *direct* mode of alienation. But accident gave birth to two *indirect* modes, namely, by fines and common recoveries. Though it might be proper to incapacitate the wife from being influenced by the husband to prejudice herself by any conveyances or agreements during the coverture, yet justice to others required, that such as might have any claim on the wife's freehold or inheritance, should not be forced to postpone their suits till the marriage was determined; for if they should, then, to use the words of Bracton, in explaining why the husband's infancy would not warrant the parol to demur in a suit for the wife's land, *mulier implacitata de jure suo si propter minorem ætatem viri posset differre judicium, ita posset quælibet mulier in fraudem nubere*. Bract. lib. 5. tract. 5. c. 21. fo. 423 a. Probably it was on this principle, the common law allowed a judgment against husband and wife in a suit for her land to be as conclusive, as if given against a feme sole; which was carried so far, that, till the statute of Westminster the second, even judgment against them, on default in a *possessory* action for the wife's freehold, drove the wife, after the husband's death, to a writ of right to recover her land. 2 Inst. 342. From enabling the husband and wife to defend her title, and making the judgment on such defence to be conclusive, permitting them to compound the suit by a final agreement of record, in the same manner as other suitors, was no great or difficult transition; more especially when it is considered, that in the case of *femes covert* fines are never allowed to pass, without the court's secret examination of them apart from their

Geo. 3. c. 75. the sale of fee-farm and other unimprovable rents is directed; and by stats. 38 Geo. 3. c. 60. 42 Geo. 3. c. 116. and 48 Geo. 3. c. 73. s. 11. the surveyor-general is empowered to sell such manors or lordships belonging to the crown as consist of manorial rights and quit rents, and other property of an unproductive nature. As to the disposition of private property belonging to the king, see ante, vol. 1. p. 66. n. (a); and as to grants of lands escheated, see ante, p. 194. n. (15).

With regard to the construction of the king's grants, these, as they chiefly proceed from

dere (2). Of the several parts of a fine, and many incidents to the same, you shall read in my Reports.

husbands, to know, whether their consent is the result of a free choice, or of the husband's compulsive influence. Such, we conceive, is the true source, whence may be derived the present force of fines and common recoveries, as against the wife, who joins in them; for, whatever in point of bar and conclusion was their effect, when in suits really *adverse*, of course attended them, when they were *feigned*, and in that form gradually rose into modes of alienation, or as the more usual phrase is, *common assurances*. The conjecture we have thus hazarded to illustrate, how it happens, that a married woman may alienate her real rights by fine, though not by any instrument or act strictly and nominally a conveyance, leads to proving, that the common notion of a fine's binding *femes covert* merely by reason of the *secret examination* of them by the judges is incorrect. If the *secret examination of itself* was so operative, the law would provide the means of effectually adding that form to ordinary conveyances, and so make them conclusive to *femes covert* equally with a fine. But it is clearly otherwise; and, except in the case of conveyances by *custom*, there must be a *suit* depending for the freehold or inheritance, or the examination being *extra-judicial* is ineffectual. In the Second Institute, Lord Coke represents this to be the *general law*, and, amongst many other authorities cited to prove it, refers to a case of Hen. 7. reported by Kielway, in which, whether the examination of a *feme covert*, on the inrolment of a bargain and sale to the king, sufficed to bind her, was largely debated. 2 Inst. 673. Kielw. 4 a. to 20 a. The just explanation therefore of the subject is, that the *pendency of a real action* for the *freehold* of the land, in consequence of previously taking out an original writ, without which preliminary, even at this day, a fine is a nullity, should be deemed the *primary cause* of the fine's binding a *feme covert*; and that the *secret examination* of her, on taking the acknowledgment of the fine, is only a *secondary cause* of this operation. Such are the *three chief effects*, by reason of which, fines, no longer used, according to their original, as recorded agreements for conclusion of *actual suits*, have been changed into, and are still retained, as *feigned proceedings*; and being thus accommodated to answer purposes, to which ordinary con-

veyances cannot be applied, it is no wonder, that they should not only be considered as a species of conveyance, but also be deemed a principal guard to the titles to real property, and as such be ranked amongst the most valuable of the common assurances of the realm. In this digression on the properties of a fine, we have purposely omitted to consider its operation, either as an *estoppel*, except so far as it may be said to be one to the issue in tail by force of the 4 H. 7. and 32 H. 8. or as a *discontinuance*, or lastly in respect of the *conusor's warranty*, which is always inserted in it. The virtues of a fine, in the three points of view we have examined it, namely, to extinguish dormant titles, to bar the issue in tail, and to pass the interests of *femes covert*; these constitute the more *peculiar qualities*, on account of which it is most usually, if not always, resorted to. As to the three other effects, it may be enough to observe here, that they are equally incident to feoffments, or any other deeds having warranties annexed. The distinct consideration of them is reserved for another occasion. —[Hargr. n. 1. 121 a. (171).]

[With respect to the operation of a fine by a tenant in tail, it may be further observed, that when a person who has an estate tail, with an immediate reversion in fee, levies a fine with proclamations, the effect of the fine will be to bar the estate tail, and convert the same into a determinable fee, which will merge in the fee-simple. In this case, the title depends partly under the ownership of the estate tail, and partly under the ownership of the reversion in fee; and the reversion having become an estate in possession, the possession is immediately chargeable with all incumbrances which affected the reversion in fee. Hence it is considered advisable, that a tenant in tail with reversion or remainder in fee by descent, should suffer a common recovery instead of levying a fine. 1 Prest. Conv. 14. But a title derived by means of a fine levied by tenant in tail, with the reversion in fee by descent, is, *prima facie*, good; and a purchaser cannot object to it, for want of a common recovery; unless he can show that the reversion in fee has been aliened or incumbered. *Sperling v. Trevor*, 7 Ves. 497.] —[Ed.]

(2) If binding the *parties* or even *privies*, exclusive of heirs in tail, was the only effect

the bounty of the crown, have at all times been construed most favourably for the king, and against the grantee; contrary to the manner in which all other assurances are construed. A subject's grant shall be construed to include every thing necessary to the enjoyment of the thing granted, without express words, ante, 56 a. vol. 1. p. 641; but the king's grant shall

*“*Dicebatur finis, quia finem litibus imponebat* (B).” Here 262 a
 you may observe the etymology of a fine. And herewith *agreeth (612)*
 (613)*

of a fine, it would scarce be preferable to less solemn agreements; for, without doubt, they are so far binding. The most distinguishable properties of a fine are barring *strangers* unless they claim within five years, barring the *issue in tail immediately*, and binding *femes covert*, as we have explained in the foregoing note—[Hargr. n. 2. 121 a. (172).]

[The parties to a fine are, 1st. The plaintiff, frequently denominated the *conuizee*. 2dly. The deforciant, who is generally denominated the *conuzor*, and is the person by whom the fine is acknowledged, and consequently the person who is the grantor in the fine. Shep. Touch. 2. 1 Prest. Conv. 200, 201. And these are concluded by the fine, whether any interest pass or not, since every one shall be concluded by his own deliberate act. *Privies*, who are either privies in *estate*, as the donor and donee; in *blood*, as the heir and ancestor; or in *law*, as the lord and tenant, &c., Hob. 333; are also estopped, and will be bound by a fine, although the freehold is not in either of the parties. Jenk. Cent. 274. 1 Prest. Conv. 259. For the act of the ancestor shall bind the heir, and the act of the principal his substitute,

or such as claim under any conveyance made by him subsequent to the fine so levied. 3 Co. 87. But a fine by a mortgagor or mortgagee, even with proclamations, will not bar the other of them. 1 Prest. Conv. 237. And in order to bar an estate tail by fine, the privies must be privies in *estate*; it is not enough, that the issue be privies in blood only; they must claim *the estate* from the person levying it, or derive title through him. Therefore if a gift is made to a man, and the heirs male of his body, with remainder to him and the heirs female of his body, and he dies, leaving a son and daughter, a fine levied by the son, though it will bind his own issue, will not bind his sister or her issue; for though she be heir to her brother, and so privy in *blood* to him; yet she is not privy to him in *estate*, as she does not claim in, from, or through him. Shep. Touch. 20. Watk. Conv. 126. So if limitations are made in favour of the first and other sons successively in tail, a fine levied by the elder son or his issue, will not bar the younger sons, or their issue, by force of the statutes of Proclamations. Each son has a distinct intail, and the younger sons and their issue

not enure to any other intent than that which is precisely expressed in the grant. 2 Bl. Com. 347. Bro. Abr. tit. Patent, pl. 62. Finch. L. 110. When it appears, from the face of the grant, that the king is mistaken or deceived, either in matter of fact, or matter of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes: or if the grant be informal; or if he grants an estate contrary to the rules of law; in any of these cases the grant is absolutely void. Freem. 172. Finch. 101, 102. Bro. Abr. tit. Estates, 34. tit. Patents, 104. Dyer, 270. Dav. 45. And to prevent deceits of the king, with regard to the value of the estate granted, it is provided by the stat. 1 H. 4. c. 6. that no grant of his shall be good, unless in the grantee's petition for them express mention be made of the real value of the lands; and the stat. 34 Geo. 3. c. 75 s. 8. enacts, that before any grant or lease of crown lands is made, a survey of the premises, and an estimate of the improved annual value thereof, shall be made and certified on oath by practical surveyors appointed by the lords of the treasury, or the surveyor-general of the land revenues of the crown; unless where the premises are of a known, fixed, and unimprovable value, or where from the nature of the premises, the value cannot be ascertained by means of a survey, or the value thereof is so inconsiderable as to render it inexpedient to incur that expense; in which case leases may be granted or renewed without a survey. Sect. 9. Where it is inserted in the king's grants, that they are made *ex certa scientia, mero motu, et speciali gratia*, which is now usually done, they will then be construed liberally, and according to the apparent intent of the king. 1 Co. 40. And where the king's grants are made upon a valuable consideration, they shall be construed favourably for the patentee. 6 Co. 6 a.

The nature and operation of fines and recoveries, which are the two other species of assurance by matter of record, will be explained in the present chapter.—[Ed.]

(B) Fines are divided into four sorts:—1st, Fines *sur cognizance de droit come ceo, &c.*; 2d. Fines *sur cognizance de droit tantum*; 3d. Fines *sur concessit*; 4th. Fines *sur done grant et render*.

A fine *sur cognizance de droit come ceo qu' il a de son done* is in more general use, and is the best and surest kind of fine; for the deforciant, in order to keep his supposed covenant with the plaintiff, of conveying him the lands in question, and at the same time to avoid the

(d) Glanv. lib. 8. Cap. 3.
Bract. lib. 5. fol. 436. Flota, lib. 6. cap. 52, 53.
(e) Etymologies, &c. Vid. sect. 74. 174. 191. 441. 520. 592.

antiquity (d): *Finis ideo dicitur finalis concordia, quia imponit finem litibus*. And after the example (e) of Littleton, it is good to search out the etymology or right derivation of words: for *ignotus terminis ignoratur et ars*, as hath been often observed in other places. And the civilians call this judicial concord, *transactionem judicalem de re immobili*.

do not claim under the same intail with the person by whom the fine is levied. 1 Prest. Conv. 309. But a gift to a man in tail general, will enable the eldest son after the death of the father, to bar the intail, so far as to exclude his brothers and sisters, and their issue, as well as his own issue, for they are privies both in blood and estate to the eldest son, *infra*, 372 a; but unless the intail had descended on him or his issue, his brothers, or other collaterals, would not have been barred. *Bradstock v. Scovell*, Cro. Car. 434. Hob. 258—333. Strangers to a fine are all persons, who are neither parties nor privies. And these, we have seen, are also bound by a fine, unless they claim within five years, after proclamations made; provided they are under no legal impediments, and have then a present interest in the estate. The impediments are coverture, infancy, imprisonment, insanity, and absence beyond sea: and persons who are thus incapacitated, have five years allowed them to put in their claims after such impediments are removed. Persons also that have not a present, but a future interest only, as those in remainder or reversion, have five years allowed them to claim in, from the time that such right accrues, *infra*, 372 a; though, in the case of a forfeiture by the tenant for life levying a fine,

the remainder-man, or reversioner, may enter to avoid the fine, either within five years after the last proclamation, or within five years after the death of the tenant for life, 3 Co. 78 b. *Whaley v. Tancred*, Vent. 241.; or if a person have two distinct estates in the same land, as an estate in tail and in fee, or for life and in fee, he may enter to avoid the fine when the latter gives him a right to the possession, although he neglected to claim in time to save his right, under the more immediate estate. Shep. Touch. 34. 1 Prest. Conv. 240. But if within that time they neglect to enter or claim, or, by the statute 4 Ann. c. 16, if they do not bring an action to try the right, within one year after making such entry or claim, and prosecute the same with effect, all persons whatsoever (except the king, 11 Co. 74. 1 Bl. Com. 247. Ante, 90. vol. 1. p. 340, 341, and ecclesiastical corporations, aggregate or sole, who cannot be barred by non-claim on a fine; though ecclesiastical persons being sole corporations, as bishops, parsons, or vicars, *Croft v. Howell*, Plow. 536. or heads of ecclesiastical bodies, and officers entitled to lands in right of their office, may be barred by non-claim, but their non-claim will not affect their successors, *Howell's case*, *ibid*. 376. *Magdalen College case*, 11 Co. 78 b.

formality of an actual feoffment, with livery of seisin, acknowledges in court a former feoffment, or gift in possession, to have been made by him to the plaintiff; so that it is rather an acknowledgment of a former conveyance than a conveyance originally made; for the deforciant acknowledges, *cognoscit*, the right to be in the plaintiff, or cognizee, as that which he had *de son done*, of the proper gift of himself, the cognizor. This species of fine has been called a feoffment of record, ante, 10 a. p. 223. 1 Salk. 339. 3 Atk. 141; but this expression is by no means accurate, for there are cases in which a feoffment has a more extensive operation than a fine, see *Parkhurst v. Smith*, Willes, 342. 18 Vin. Abr. 413, 414. *William, d. Hughes v. Thomas*, 12 East. 147; and, therefore, Sir William Blackstone has justly remarked, that it might with more accuracy be called an acknowledgment of a feoffment of record. 2 Bl. Com. 352. This species of fine, *prima facie*, without any words of limitation, passes a fee, ante, 9 b. vol. 1. p. 499; but it admits of words of express limitation for life or in tail, and in such case it will pass that estate only which is expressed in the concord, being the clause of the grant. *Hunt v. Bourne*, 1 Salk. 340. Bro. Abr. Fine, pl. 10. Co. Read, 4. And when the grant is confined to that degree of interest, of which the cognizor is owner, no forfeiture will be incurred, 1 Prest. Conv. 202; though in general, we have seen, that where a person who has merely an estate for life of the legal estate levies, or accepts a fine of this description, he will forfeit his estate for life. Ante, 252 a. p. 208, 209. and n. (n) *ibid*. A fine sur cognizance de droit come ceo conveys a clean and absolute freehold, and gives the cognizee a seisin in law, without any actual entry, ante, 266 b. p. 461; and it is therefore called a fine executed. 2 Bl. Com. 353. Co. Read. 2. A rent cannot be reserved on this species of fine, or on any other which is executed; because, as the

If tenant in tail levy a fine with proclamations according to the statute, this is a bar to the estate tail, but not to him in reversion or remainder, if he maketh his claim, or pursue his action, within five years after the estate tail spent. 372 a.

Fine by tenant in tail, a bar to the issue: secus as to the remainderman or reversioner, if

he enter within five years after his right accrued. 4 H. 7. c. 24, & 32 H. 8. c. 36. (10 Rep. 43.)

Howlett v. Carpenter, Ventr. 311. 1 Prest. Conv. 235.) are barred of whatever right they may have, by force of the statute of Non-claim. 4 H. 7. c. 24. But, in order that a fine may operate by non-claim, it is necessary that an estate of freehold shall be in one of the parties to the fine, at the time of levying the same; otherwise it will be void, or voidable, by the plea, that *partes finis nihil habuerunt tempore finis levati*. 3 Wils. 249. *Dyer*, 215. *Fermor's case*, 3 Co. 77. A tenant for years, (unless he has previously acquired the freehold by means of a feoffment, *Hardr.* 402. 2 Lev. 52. 2 Bl. Com. 357, without covin, for if he continues the possession, and pays rent, the fine will be void, notwithstanding he has previously made a feoffment. *Some's case*, 3 Co. 79), or the owner of any chattel interest, or any person who has mere possession, or the receipt of rent of another's tenant, has not such an estate as will be a sufficient foundation for a fine. Ante, 323, 324. p. 398—400. *Plowd.* 358. On the latter point, the law is, that the possession of the tenant is the possession of him in remainder or reversion. Ante, 323, 324. p. 398—400. *Plowd.* 358. 1 Prest. Conv. 236. *Doe, d. Burrell v. Perkins*, 3 Maul. & S. 271. And it is a general

rule, that a fine will not operate as a bar by non-claim, unless the estate to be barred is previously divested, or is divested by the operation of the fine. *Prodger's case*, 9 Co. 104. *Saffyn's case*, 5 Co. 123. Hence the necessity of *adverse* possession, that a fine may operate in this mode. 1 Prest. Conv. 224. 227. But it is immaterial whether the freehold is in possession, remainder, or reversion, *Jenk. Cent.* 254; and whether it is in the conusor or conusee (1 Prest. Conv. 258), or whether it has been gained by right or wrong, or is under a defeasible title (*Carter v. Barnardison*, 1 P. Wms. 105), is of no consequence. It has, however, been determined, that if a fine be levied by a person in remainder, an actual entry is not necessary to avoid it. *Roe v. Power*, 2 N. R. 1. *Doe, d. Truscott v. Elliott*, 1 Sel. & B. 85. As between parties and privies, a fine will be good, although the freehold is not in either of the parties. *Jenk. Cent.* 274. *Grant's case*, 10 Co. 50. *Johnson v. Bellamy*, 2 Leon. 36. The doctrine as to entry to avoid fines, will be more fully considered, in the chapter which treats of the remedy by entry. Post, ch. 47. vol. 3. p. 18. n. (L). As to the different sorts of fines, see *infra*, n. (B).—[Ed.]

cognizance supposes a preceding gift, the cognizor cannot reserve to himself any thing out of lands, whereof he has already conveyed away the absolute property, *Bro. Abr. tit. Fine*, pl. 30; but if an estate for life only be conveyed by the fine, the cognizor may then reserve a rent with a clause of distress. *Rol. Abr. tit. Fine (O)*, pl. 10. 5 Cru. Dig. 50.

A fine *sur cognizance de droit tantum*, or upon acknowledgment of the right only, without the circumstance of a preceding gift by the cognizor, is generally used to pass a reversionary interest, which is in the cognizor: for of such reversions there can be no feoffment, or donation with livery supposed, as the freehold and possession during the particular estate is vested in a third person. *Moor.* 629. This species of fine is executory, and passes a fee-simple without the word "heirs." Ante, 9 b. vol. 1. p. 499. It is also used to surrender the life estate of a tenant for life. *Co. Read.* 3; and is proper where a person, who has an estate for life, with a remote estate of inheritance, wishes to convey both estates, so as to avoid the forfeiture of the estate for life. But it is now very rarely levied, as all these objects may be attained by a fine *sur concessit*. 1 Prest. Conv. 212. Et vid. *Ludlow and Ux.*, conusors, *Drummond*, conusee, 2 Taunt. 84.

A fine *sur concessit*, is where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right or gift, grants to the cognizee an estate *de novo*, by way of supposed composition, either for years, for life, in tail, or in fee, 2 Bl. Com. 353; and this may be done reserving a rent, or the like; for it operates as a new grant. *West.* p. 2. s. 66. This fine is in frequent use, for the purpose of passing the estates of married women who are tenants for life, or for creating terms for years, which are to bind contingent, or executory estates, by way of estoppel. 1 Prest. Conv. 213.

A fine *sur done grant et render*, is a double fine, comprehending the fine *sur cognizance de droit come ceo*, &c. and the fine *sur concessit*; and may be used to create particular limita-

(f) Dalison,
2 Eliz. & 7 El.
Vid. Lib. 3.
fol. 84. le case
de Fines.
(3 Leon. 10.)
*372 b.

(f) If a gift be made to the eldest son, and to the heirs of his body, the remainder to the father, and to the heirs of his body, the father dieth, the eldest son levieth a fine with proclamations, and dieth without issue : this shall bar *the second son, for the remainder descended to the eldest.

Tenant in tail being disseised, or having a right of action, a fine by the tenant of the land after five years, bars the right of the estate tail.
If tenant in tail be disseised, or have a right of action, and the tenant of the land levy a fine with proclamations, and five years pass, the right of the estate tail is barred.

(Ante, 120 b. 9 Rep. 101. Plowd. 374 a. 375 a. Cro. Eliz. 896. Noy. 46. Dyer, 3 b. 133 a.)

154 a.
Definition of
a common re-
covery.

Recovery (c), *recuperatio*, cometh of the verb *recuperare*, i. e.

tions of estate : whereas the fine *sur cognizance de droit come ceo, &c.* conveys nothing but an absolute estate, either of inheritance, or at least of freehold. Salk. 340. In this fine the cognizor renders or grants back to the cognizor some other estate in the lands. 2 Bl. Com. 353. And it has the like operation as a feoffment and re-enfeoffment. Ante, 12 b. p. 171. n. (21). But this species of fine has fallen into disuse.

Fines are also distinguished into *fines at the common law*, and *fines with proclamations*. A fine at the common law, that is, without proclamations, is no bar to the issue in tail, or by non-claim. But in respect of its operation as a *conveyance*, it has the same effect as a fine with proclamations : and it will create a discontinuance when levied by a tenant in tail in possession. *Hunt v. Bourne*, 1 Salk. 311. But no entry is necessary to avoid this fine. *Jenkins v. Prichard*, Wils. 45. Fines with proclamations, are fines at the common law with the addition of proclamations made in pursuance of the statutes 4 H. 7. c. 24. and 32 H. 8. c. 36 ; the object of which proclamation is, 1st. To protect a defective title from dormant claims, by means of non-claim on the fine. 2dly. To bar the issue in tail when the fine is levied by tenant in tail. 1 Prest. Conv. 214. As to entry to avoid fines levied with proclamations, see post, Chap. 47. The general objects to which fines are directed, have been already explained. See ante, p. 606. n. (1).—[Ed.]

(c) A common recovery is in some respects similar to a fine ; for as a fine is the compromise of a fictitious suit, so a recovery is a fictitious suit brought against the tenant of the freehold, and carried on to judgment. 2 Bl. Com. 357. Shep. Touch. 37. A common recovery generally consists of two parts perfectly distinct :—1st. Of the recovery, which assumes all the forms of a real action, and is founded on the supposition of an adverse claim ; and 2dly. Of the recovery deed, which is, in form at least, partly a preparatory step, to suffering the recovery, and partly a declaration of the uses of the recovery when suffered. Notwithstanding the recovery assumes the form of a real action, it is considered merely as a common assurance, and the courts take notice of it as such. See *Pelham's case*, 1 Co. 14 b. 2. Bl. Com. 358, 359. Pig. Rec. 56. 1 Prest. Conv. 8. The person against whom the writ is brought is called the *tenant* ; the person suing the writ is called the *demandant*, as he claims or demands the premises as his right and inheritance, alleging that the tenant had disseised him, or at least had come in under the disseisor, or in the *post*. The tenant then calls on the remainder-man, or the person under whom he claims, to warrant his title, which is denominated vouching the person, who is thence called the *vouchee*. The vouchee either vouches over, or makes default. On default made, judgment is given that the demandant recover against the tenant, and that the tenant recover against the vouchee or warrantor, and so on, which is called the *recovery in value*, or recompense, and is always supposed to go as the lands would have gone if they had not been recovered ; though indeed, this recompense is merely nominal, and the judgment to recover in value is mere form. When the præcipe is brought immediately against the tenant in tail, it only bars him of the estates of which he is then actually seised. *Taltarum's case*, 12 Ed. 4. 14. Pig. Rec. 9. Bro. Abr. Tail, 32. It is, therefore, usual for him to convey an estate of freehold to another person, that the præcipe may be brought against such person (who is called the *tenant to the præcipe*), and that such person may vouch the tenant in tail ; for if the tenant in tail comes in as vouchee, it bars every latent right and interest which he may have in the lands. If the præcipe be brought immediately against the tenant in tail, and he vouch over the common

*ad rem per injuriam extortam sive detentam per sententiam** (614)*
judicis restitui. And *recuperatio* in the common law, is all one

vouchee, it is called a recovery with *single voucher*, see Fearn. Post. Works, p. 336; if against the tenant of the freehold, and he vouch over the tenant in tail, and the tenant in tail vouch over the common vouchee, it is called a recovery with *double voucher*; and so on, according to the number of persons vouched. And when an intail is to be barred, it is always proper, for the reasons before mentioned, to suffer a recovery with a double voucher. Watk. Conv. 134. Such a recovery, in which the tenant in tail is vouched, and is vouched over, will not only bar an actual estate tail, of which he is seised, but it will bar all estates tail which have been divested, discontinued, or previously aliened. Salk. 571. Brook. Tail. pl. 32. And it may bar several estates tail, or the right to several estates tail, by one and the same operation. *Baxton v. Lever*, Cro. Eliz. 388. 1 Ves. 253. It will also bar all remainders and reversions expectant thereon, even though the estate tail has been previously barred by a fine with proclamations levied by the tenant in tail. *Sheffield v. Rutcliffe*, 2 Rol. Rep. 418. And the better opinion seems to be, that a recovery suffered by the issue in tail after the death of the ancestor, and after a fine with proclamations levied by the ancestor, which has effectually barred the estate tail, will bar all remainders and reversions, which are, or were expectant on the estate tail. Fearn. Post. Works, 442. 1 Prest. Conv. 126. 1 Prest. Abst. 394, 395.

With respect to the effect of a recovery, it may be further observed, that the recoveror, generally speaking, gains a clear and absolute fee in the premises recovered. But where the person by whom the estate tail was created, had a determinable or defeasible fee, the recovery cannot do more than acquire the ownership for the whole of that determinable or qualified fee. 1 Prest. Conv. 141. And when a tenant of a remote estate tail suffers a common recovery, in which he is vouched, and vouches over, the effect of this recovery will be merely to bar his own estate tail, and the remainders and reversions expectant thereon, (3 Co. 6. 8 T. R. 10), and all conditions and collateral limitations annexed to his estate: it will not affect prior estates tail, or any other prior estates. *Smith v. Clifford*, 1 T. R. 738. And the fee acquired by such recovery may be barred by a recovery afterwards suffered by the tenant of a prior estate tail. 1 Prest. Abst. 394. So when the intail is of a subject which has a limited duration, as a rent-charge, created *de novo*, and limited for an estate tail, without any remainders over, the recovery of tenant in tail cannot enlarge the estate beyond the period prescribed for its duration. 1 Prest. Conv. 140. Ante, vol. 1. p. 448. n. (r). It is also observable, that the estate recovered is not subject to any charges but to those of the recoveree. Hence it is preferable, in some cases, to a fine, as a fine lets in the incumbrances of the ancestors as well as those of the cognizors. Watk. 134. Ante, p. 610. n. (1). On the other hand, a fine is, in some instances, preferable to a recovery, as the former operates as an *estoppel* by the statute, where a recovery would not estop. Pig. Rec. 32, 34, 55. 2 Cru. 271. Plowd. 515. Ante, p. 610. n. (2). But no tenant in tail can, by suffering a common recovery, bar any charges which are an incumbrance on his own estate, nor any estates derived out of his own estate tail. On the contrary, he may give stability to these estates and charges, by suffering a common recovery. *Goodright v. Mead*, 3 Burr. 1703. *Stapilton v. Stapilton*, 1 Atk. 2. 1 Prest. Conv. 142.

With respect to the persons who may suffer recoveries.—A recovery may be suffered by a tenant in fee-simple, in order to strengthen the title, Watk. 135; but it will not bar an executory devise or springing use annexed to that estate, *Pells v. Brown*, Cro. Jac. 590. Palm. 131. 2 Fearn. Ex. Dev. 66. 69. Pig. Rec. 134: though a recovery by tenant in tail will bar an executory devise or springing use annexed to his estate. *Page v. Hayward*, 2 Salk. 570. 1 Prest. Conv. 3. So a feme covert may convey her freehold and inheritance by suffering a recovery; and no fine is necessary on account of coverture, when a recovery is suffered. 1 Prest. Conv. 34. The husband has the freehold in right of his wife, and he alone may convey the freehold to make a good tenant to the præcipe, 2 Rol. Abr. 394. pl. 4. *Robinson v. Cumming*, Cas. Temp. Talb. 114. Atk. 473; but the wife will not be barred unless she is vouched. 1 Prest. Conv. 56. Where the wife has the freehold by way of separate estate, she is to be considered as a feme sole, and alone is competent to make a good tenant of the freehold. 1 Prest. Conv. 34. 36. A recovery, with the concurrence of the freeholder, may be suffered by a tenant in tail, either in possession, reversion, or remainder, 2 Rol. Abr. 394; or by a person who has the *right of an estate tail* once vested, and which has been divested or discontinued, *Maxwell's case*, 2 Plowd. 8 b. 3 Co. 6. *Sheffield v. Rutcliffe*, Hob. 334. *Lincoln College case*, 3 Co. 38 b.; or, as before observed, by the heir in tail, after the estate tail has been barred by fine, or the heirs are bound by warranty.

- (615)* with *evictio* in the civil law, which is *alicujus* rei in causam alterius abductæ per judicem acquisitio*.

Supra, p. 614. *Barton v. Leaver*, Cro. Eliz. 388. But a person who has a *contingent* or *executory interest* in tail, as under an executory devise, or a springing or shifting use, cannot suffer a common recovery with effect, so as to bar either his own interest (except by way of estoppel), or the issue in tail, or those in remainder or reversion: nor can the issue in tail suffer a common recovery with effect in the life-time of the ancestor. *Apprise v. Apprise*, 1 Keb. 391. 1 Prest. Conv. 142. 1 Prest. Abst. 395. The *alienee* of a tenant in tail, or the *assignee* of the crown, claiming the estate of a tenant in tail under an attainder for treason, cannot, in any case, bar the estate tail or the remainders, by suffering a common recovery. Hob. 259. And the right of suffering a common recovery is a privilege personal to the donee in tail, and his heir in tail, when heir: therefore a corruption of the inheritable blood of the issue, by the attainder of their ancestor for treason, will preclude their right to suffer a common recovery so as to bar the remainders. Jenk. Cent. 251. Hob. 345. And attainder of tenant in tail creates a disability to suffer a common recovery, *Barton's case*, 2 Rol. Abr. 394. Jenk. Cent. 250; though between the crime and attainder, it should seem, that a common recovery may be suffered. *Stevens v. Winning*, 2 Wils. 219. 1 Prest. Conv. 140. But a recovery suffered by a tenant in tail, being an *alien*, will bar the remainders expectant on his estate. 4 Leon. 84. It may be further observed, that a recovery will be good only for that portion of estate which is vested in the tenant in tail who is vouched. Thus, when several persons are tenants in common, or joint-tenants in tail, and one of them is vouched, the recovery will be good only for his share; or, if several are vouched, the recovery will be good only for their respective shares. 1 Prest. Conv. 143. And the recovery to be good for a particular share, must be with the concurrence of the person who has the freehold of that *identical* share. Ibid. 144. It is also observable, that a common recovery cannot be suffered by a tenant in tail after possibility, *ibid.*; nor by a tenant in tail of the king's gift, whereof the remainder or reversion is in the king, stat. 34 & 35 H. 8. c. 20. *Infra*, 372 b.; or by a woman tenant in tail *ex provisione viri*, except with the concurrence of the issue in tail, or person in remainder, see stat. 11 H. 7. c. 20; which statute extends to equitable as well as legal estates (*Clifton v. Jackson*, 2 Vern. 469.), but not to copyhold lands (*Harrington v. Smith*, 2 Sid. 41. 73. Gilb. Ten. 181. 4 Mod. 45.), nor does it extend to prohibit a woman tenant in tail *ex prov. viri*, from suffering a recovery jointly with her husband (*Kirkman v. Thompson*, Cro. Jac. 474.), or with the issue in tail (*Mackwilliam's case*, Hob. 332. 3 Co. 59.), unless the title of such issue is defeated by the birth of a more immediate heir in tail, 3 Co. 60. Et vid. Post, Chap. 50. Of Continuance. And by stat. 14 Eliz. c. 8. no tenant for life can suffer a recovery so as to bind them in remainder or reversion; unless the same is made with the concurrence of the remainder-man in tail. Salk. 571. *Infra*, 362 a. As a caution against any prejudice to the tenant for life, from concurring with the tenant in a recovery, the clause called the one hundred thousand pound clause has been adopted: by which clause, a condition is annexed to the estate conveyed to the tenant to the writ of entry, stipulating that the estate should be void, unless that sum should be paid within a given time (being a period after the recovery is intended to be completed); and by the operation of this condition, the tenant for life will be restored to his former estate, unaffected by any of the incumbrances of the tenant in tail. The recovery will also remain in force, since it is sufficient that there be a tenant to the writ of entry at the time of suffering the recovery, though that seisin be afterwards defeated by a condition, or for any other reason. 3 Prest. Conv. 438, 439. In all recoveries it is absolutely necessary that the recoverer or tenant to the præcipe, should be actually seized of the freehold. Fig. Rec. 28. Post, vol. 3. p. 6. n. (x); and this must be the *immediate* freehold; for if A. be tenant for life, remainder to B. for life, in tail, or in fee, though B. has an estate of freehold, yet A. having the *immediate* freehold, or the person who claims under his conveyance, is the person that must (to bar the estate tail, &c.) be named tenant in the proceedings. Fig. 37. *Smith d. Dormer v. Parkhurst*, 3 Atk. 135. 2 Stra. 1105. 1 Prest. Conv. 48. But by stat. 14 Geo. 2. c. 20, it is enacted, that though the legal freehold be vested, in lessees for lives, yet those who are entitled to the next freehold estate in remainder or reversion may make a good tenant to the præcipe: this act, however, does not extend to persons who have estates of freehold, by act of law, as tenants by the curtesy, or in dower; or to persons having estates for life under marriage settlements, wills, &c. or by any other means than leases at *reserved rents*. 1 Prest. Conv. 69. The same statute also enacts, that though the deed or fine which creates the tenant to the præcipe be subse-

*(g) And of common recoveries there be two sorts, viz. one with a single voucher, and another with a double voucher, *and that is more common and more safe: there may be more vouchers over (d).

690. Vid. Lib. 3. fol. 5. Cuppledick's case, & fol. 94. 97. 106. Lib. 1. fol. 62. Capel's case. Lib. 2. fol. 16. 62. 74. 77. Lib. 5. fol. 41. 42. Lib. 10. fol. 37. Marie Portington's case. Post. 386 a.)

(617)*

If a recovery be had against tenant for life, without consent or covin, though it be without title, and execution be had, and tenant for life dieth, the reversion or remainder is discontinued, so as he in the reversion or remainder cannot enter; but if such a recovery be had by agreement and covin between the demandant and the tenant for life, then, as hath been said, it is a forfeiture of the estate for life, and he in the reversion or remainder may enter for the forfeiture. So it is if the tenant for life suffer a common recovery at this day, it is a forfeiture of his estate; for a common recovery is a common conveyance or assurance, whereof the law taketh knowledge.

362 a.
Nature and operation of a common recovery.
5 Ass. 3. 5 E.
3. Entre
Cong. 42.
Lib. 1. fol. 15.
16. Sir William Polham's case.
(8 Rep. 8 h.)
(Post. 366 a.)
Common recovery by tenant for life, no bar to the remainderman or reversioner.
(h) 3 H. 8.
Cap. 31. 14
Eliz. cap. 8.
Sect. 67b.
(10 Rep. 49.)

Since Littleton wrote, there were two statutes (h) made for preservation of remainders and reversions expectant upon any manner of estate for life; the one in 32 H. 8., the other in 14 Eliz.: but 32 H. 8., extended not to recoveries, when tenant for life came in as vouchee, &c. and therefore that act is repealed by 14 Eliz., and full remedy provided for preservation of the entry of them in reversion or remainder. But the statute of 14 Eliz., extendeth not to any recovery, unless it be by agreement or covin.

quent to the judgment of recovery, yet, if it shall appear to be levied or executed in the same term, the recovery shall be valid in law, *Lord Say and Sele's case*, 10 Mod. 43. *Goodright v. Rigby*, 2 Dow. 250, 251; and that, though the recovery itself do not appear to be entered, or be not regularly entered, on record, yet the deed to make a tenant to the præcipe, and declare the uses of the recovery, shall, after a possession of twenty years, be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery was duly suffered. But such presumption may be rebutted by the production of deeds, which show a defect of title under the recovery, by proving that there was not a good tenant to the writ of entry. *Keene, d. Earl of Portsmouth v. Earl of Effingham*, Stra. 1267. *Goodtitle, d. Bridges v. Duke of Chandos*, 2 Burr. 1971. The stat. 14 Geo. 2. c. 20, also provides, that every recovery shall, after the expiration of twenty years from the time of the suffering thereof, be deemed good and valid, if it appears, upon the face of such recovery, that there was a tenant to the writ, and if the persons joining in such recovery had a sufficient estate and power to suffer the same, notwithstanding the deed or deeds for making the tenant to such writ should be lost, or not appear. And where a lease and release were made to create a tenant to the præcipe in a recovery, and the lease was lost, it was held to be a case to which the relief given by this statute applies. *Holmes v. Ailshie*, 1 Mad. Rep. 551. But this act does not extend to any case in which the deeds making the tenant are produced; so that if the deeds are produced, they may defeat the operation of a recovery, which otherwise would have been presumed to have been good. 1 Prest. Conv. 85. Lastly, although a recovery without a good tenant to the writ of entry is voidable by the issue in tail and those in remainder or reversion; yet as against the tenant in tail who suffered the same, it operates as a conveyance, and will be good against him by estoppel. *Marquess of Winchester's case*, 3 Co. 3 b. *Owen and Morgan's case*, 3 Co. 5. *Lincoln College case*, 3 Co. 59. *Lord Say and Sele's case*, 10 Mod. 40. So a recovery suffered by tenant in fee operates as a conveyance and will be good against him and his heirs, though there was no good tenant to the writ of entry. *Webb v. Nect*, Hill. Cro. Eliz. 21. *Shelley's case*, 1 Co. 96. Fig. Rec. 37. 1 Prest. Conv. 86. With respect to equitable recoveries, see ante, p. 599. n. (c); and as to deeds to lead, and deeds to declare the uses of fines and recoveries, see ante, p. 583. n. (s).—[Ed.]

(d) See supra, n. (c). *Doe, d. Greasley v. Nelson*, 2 Taunt. 59.—[Ed.]

Secus as to a common recovery by tenant for life with the concurrence of tenant in tail. (f) Lib. 3. fol. 60, 61. Lincoln Colledge case.

(618)* Common recovery by tenant in tail in possession, is a bar to all remainders and reversions;

Secondly, (i) if there be tenant for life, remainder in tail, the reversion or remainder in fee, if tenant for life be impleaded by agreement, and he vouch tenant in tail, and he vouch over the common vouchee, this shall bar the reversion *or remainder in fee, although he in the reversion or remainder did never assent to the recovery; because it was not in the intent of the act to extend to such a recovery, in which a tenant in tail was vouched; for he hath power by common recovery, if he were in possession, to cut off all reversions and remainders. And so if tenant for life had surrendered to him in remainder in tail, he might have barred the remainders and reversions expectant upon his estate.

Thirdly, where the proviso of that act speaketh of an assent of record by him in reversion or remainder, it is to be understood, that such assent must appear upon the same record, either upon a voucher, *aïd prier*, receipt, or the like; for it cannot appear of record, unless it be done in course of law, and not by any extrajudicial entry, or by *memorandum*.

(2 Rol. Abr. 23. 146.)

372 b. and to the estate tail. (k) 12 E. 4. 9. Taltarum's case. Secus to a common recovery (or fine) by tenant in tail of the king's gift, the reversion or remainder being in the crown. (d) 33 H. 8. Taille. Dr. 41. Pl. Com. fol. 555. 29 H. 8. Dyer, 62. (m) 31 H. 8. cap. 29.

(k) A common recovery with a voucher over, and a judgment to recover in value, was a bar of the estate tail when Littleton wrote.

(l) If the king had made a gift in tail, and the donee had suffered a common recovery, this should have barred the estate tail in Littleton's time, but not the reversion or remainder in the king. And so if such a donee had levied a fine with proclamations after the statute of 4 H. 7., this had barred the estate tail, although the reversion was in the king (1). (m) But since Littleton wrote, a common recovery had against tenant in tail of the king's gift, or such a fine levied by him, the reversion continuing in the crown, is no bar to the estate tail by the statute of 34 H. 8. (2). And where the words of the statute be (whereof the reversion or remainder at the time of such recovery had, shall be in the king), these ten things are to be observed upon the construction of that act (3).

(1) "29 H. 8. Dy. 32. accord, tail barred, but not discontinued, because the reversion is in the king; so note the issue is barred by 4 H. 7. Hob. 332. for 32 H. 8. cap. 36. was not then made. Note also, that 32 H. 8. cap. 36. excepts tenant in tail by gift of the king." Lord Nott. MSS.—[Butler, Note 322.]

[See ant. p. 607, 608, n. 1.].—[Ed.]

(2) Upon this act see Mr. Cruise's Essay on Recoveries, 2 ed. 255, and 5 Digest. ch. xiii. § 9.—[Butler.]

(3) "Nota, 34 H. 8. is not of force in Ireland, therefore the knowledge of the common law in these points is necessary there. B. being tenant in tail by gift of king H. 8. of the manor of T. an. 14 Eliz. contracted with A. to convey it to him and his heirs in consideration of a sum of money, and the manner of assurance was this: Queen Eliz. in May 14 Eliz. grants her reversion to C. and D. and their heirs; June 14 Eliz. B. suffers a recovery to the use of C. and D. and their heirs; and in the same term B. and A. levy a fine of T. to C. and D. which they grant, and render to A; and afterwards, in the same term, reconvey the reversion by fine, &c. to Queen Eliz. And now whether this estate to A. was a gift in tail ex provisione from the queen, within the statute of 34 H. 8. c. 20, was the question between E. heir of the body of A. and F. who claimed by the fine levied by the father of the said E. whose daughter he had married; and it was held by Berkeley that it was not, 1st. because the grant of the reversion to C. expresses no intent

*First, that the estate tail must be created by a king, and not by any subject, albeit the king be his heir to the reversion; *for the preamble speaks of gifts made to subjects, and none can have subjects but the king. And also in the preamble it is said (for service done to the kings of the realm), and the body of the act referreth to the preamble. (n) And therefore if the Duke of Lancaster had made a gift in tail, and the reversion descended to the king, yet was not that estate tail restrained by that statute; and so of the like (x),

(619)*
Construction
of stat. 34 H. 8.
c. 20.
(620)*

(n) Trin. 22.
Eliz. inter
Dively & Ash-
ton resolved in
the Court of
Wards.

Secondly, if the king grant over the reversion, then a recovery

Lib. 2. fol. 15
& 16. in Wille-
man's case.

of the queen to create an estate tail to A.: 2d. when the estate tail of B. was docked by the recovery, and upon the fine levied C. rendered the tail to A. he might have rendered the fee-simple if he had willed; and he was the donor of the estate tail, not the queen, except of the reversion afterwards reconveyed: 3d. this reversion reconveyed was not in the queen her original reversion, but a new reversion expectant upon the tail of A. (for the former tail was docked) wherefore A. cannot bar the reversion in the queen, but he may bar his own issue notwithstanding 34 H. 8.: 4th. because although gift in tail by a subject may be a provision of the king within the statute, nevertheless the intent should appear, which is not the case here. Hale made two questions. I. What shall be said a provision by the king within this statute, and this is a question of law. II. Whether this shall be said to be such a provision, which is matter of fact. To the first it seems, that if the queen be merely instrumental in procuring an estate tail to be settled, but that the estate itself does not proceed either from the charge, or from the bounty of the crown as a reward for service, it is no provision within this statute; and therefore it is to be seen, if in this case the intail was upon contract between subject and subject, and if the queen were merely instrumental to perfect the conveyance and save her own reversion, which is the second question, and a question of fact. To the second, that this is not such a provision, there are these presumptions: 1st. Nothing appears of record that such provision was intended, which by Coke is here held to be necessary (but Hales doubted hereof). 2d. No land, money, or other consideration, moved the queen to procure B. to grant this estate tail to A. 3d. It does not appear that the queen took notice of any service done by A. or of any favour intended by her to him. 4th. If the queen had intended a provision within the statute, she might have caused C. to convey the fee simple first to herself, and then have granted to A. in tail. 5th. If it was intended that A. should have an intail, which should not be a provision within the statute, no one can contrive any other way than this to effect it. 6th. It appears that A. was to purchase, and that the queen should not be prejudiced, nor any other person, which is effected.—Note, At the common law if the king grant lands in fee simple conditional, it was doubted if donee post porem suscitatem might have aliened to bar his issue. Riley, 438. Supra, 19 b.; but clearly not to bar possibility of reverter in the king; no, not though the alienation were with warranty collateral, unless assets descended to the king. Ante, 19 b. and 370. in margine. Sed unde alienation without warranty or assets bars subject donor, 4 H. 6. Rot. Parl. n. 51. Commons petition that feoffees who buy lands of the king, tenant in tail may enjoy them against the king. Resp. le roy s'anisera.

“Note also after Westm. 2. and before 34 H. 8. recovery or fine barred the tail of gift by the king, not the reversion to the king; so that by the wisdom of the common law, where the king raised the family, a kind of perpetuity was intended; for every man was discouraged to purchase from the donee, for no act of his could bar the king's reversion or possibility of reverter, which was a good way to preserve the memory of the king's bounty. When this would not do, upon the dissolution of monasteries, the crown having much land to bestow, began now to provide by 34 H. 8: that no alienation should bar the intail; for there needed no law for the reversion, and no other way could preserve the memory, &c.: and yet this is often eluded by a temporary grant of the reversion by the king, and a reconveyance, &c.”—Lord Edd. MSS.—[Butler, Note, 323.]

[See infra, n. (r)].—[Ed.]

(x) So it has been determined, that no estate tail granted by the crown will fall under the protection of these statutes, unless the grant appears to have been made as a reward for services. Perkins v. Sewell, 1 Bl. Rep. 654. 4 Burr 2223.—[Ed.]

suffered will bar the state tail, because the king had no reversion at the time of the recovery (f).

Lib. 7. 8. fol. 77, 78. the Lord Stafford's case. (2 Rol. Abr. 394.)

Thirdly, if the king make a gift in tail, the remainder in tail, or grant the reversion in tail, keeping the reversion in the crown, a recovery against tenant in tail in possession shall neither bar the estate tail in possession by the express purview of the statute, nor by consequence the state in remainder or reversion; for that the reversion or remainder cannot be barred, but where the estate tail in possession is barred.

Lib. 2. fol. 15, 16. Wiseman's case. Lib. 2. fol. 32. Cholmley's case.

Fourthly, if a subject make a gift in tail, the remainder to the king in fee, albeit the words of the statute be, (whereof the reversion or remainder of the same, &c.), yet seeing the estate in tail was not created by a king, as hath been said, the estate tail may be barred by a common recovery (g).

(Mo. 115. 196. 1 Rep. 16 b. 1 Cro. 430.) (631)*

Fifthly, if Prince Henry, son of Henry the Seventh, had *made a gift in tail, the remainder to Henry the Seventh in fee, which remainder by the death of Henry the Seventh had descended to Henry the Eighth, so as he had the remainder by descent; yet might tenant in tail, for the cause aforesaid, bar the estate tail by a common recovery.

Lib. 2. fol. 16. Wiseman's case.

Sixthly, the word (remainder) in the statute is no vain word; for the words of the preamble be, the king hath given or granted, or otherwise provided to his servants and subjects. The word (reversion) in the body of the act, hath reference to these words (given or granted); and (remainder) hath reference to these words (otherwise provided). As if the king in consideration of money, or of assurance of land, or for other consideration by way of provision, procure a subject by deed indented and inrolled, to make a gift in tail to one of his servants and subjects for recompense of service or other consideration, the remainder to the king in fee, and all this appear of record; this is a good provision within the statute, and the tenant in tail cannot by a common recovery bar the estate tail. So it is, if the remainder be limited to the king in tail; but if the remainder be limited to the king for years, or for life, that is no such remainder as it is intended by the statute, because it is no remainder or continuance,

(f) Formerly it was usual for persons who were seised of estates tail of the gift of the crown, to procure the consent of the crown to alienate them, which was commonly effected in this manner; the crown conveyed the reversion to a subject, either in trust for itself, or for the tenant in tail, by which means a fine or recovery was a good bar of the estate tail, according to the rule here laid down by Lord Coke, *Earl of Chesterfield's case*, Hard. 409, supra, n. (4). p. 619; but at this day the crown cannot alien the reversion or remainder in fee by any other means than an act of parliament. 5 Cru. Dig. 496. Ante, p. 604, 605, n. (A). Infra, n. (e).—[Ed.]

(g) So where William, Earl of Derby, conveyed lands to trustees, to the intent that they should convey the same to Queen Elizabeth, her heirs and successors, that the Earl of Derby might accept of a grant from the crown of the same lands, to him and the heirs male of his body, leaving the ultimate reversion in the crown, which was accordingly done: it was determined that this estate tail was not within the protection of these statutes, it being a fraudulent contrivance to create a perpetuity. *Johnson v. Earl of Derby*, 11 Mod. 304. 2 Show. 104.—[Ed.]

as it ought to, as it appeareth by the preamble; and it ought to have some affinity with a reversion, wherewith it is joined.

Seventhly, where a common recovery cannot bar the state tail by force of the said statute, there a fine levied in fee, in tail, for lives, or years, with proclamations according to the statutes, shall not bar the state tail, or the issue in tail, where the reversion or *remainder is in the king, as is aforesaid, by reason of these words in the said act (the said recovery, or any other thing or things hereafter to be had, done, or suffered by or against any such tenant in tail to the contrary notwithstanding), which words include a fine levied by such a donee, and restraineth the same. *373 a.
So resolved
Pasch.
31 Eliz.
Rot. 1645. in
Notley's
case, in Com-
muni Banco.

Eighthly, but where a common recovery shall bar the estate tail, notwithstanding that statute, there a fine with proclamations shall bar the same also. (8 Rep. 77.)

Ninthly, where the said latter words of the statute be (had, done, or suffered by or against any such tenant in tail), the sense and construction is, where tenant in tail is party or privy to the act, be it by doing or suffering that which should work the bar, and not by mere permission, he being a stranger to the act (1). (692)
(Cro. 430.
Cro. Eliz. 395.
Sid. 166.
4 Leon. 40.
Moor. 467.)

As if tenant in tail of the gift of the king, the reversion to the king expectant, is disseised, and the disseisor levy a fine, and five years pass, this shall bar the estate tail (2); and so if a collateral ancestor of the donee release with warranty, and the donee suffer the warranty to descend without any entry made in the life of the ancestor, this shall bind the tenant in tail, because he is not party or privy to any act, either done or suffered by or against him. So holden
Trin. 39 Eliz.
Rot. 1614. in
ter Stratford
& Dover, in
Communi
Banco.
(Hob. 332.
2 Rol. Abr.
773.)

Tenthly, albeit the preamble of the statute extend only to gifts in

(1) "11 Car. Cro. *obiter* in *Wyatt's case*, tenant in tail, reversion to the king, is disseised, entry of the issue is barred; which perhaps is so here, because in both cases the tail is not barred."—Lord Nott. MSS.—[*Butler*, Note 324.]

(2) "It seems to some that the case of *Stratford* and *Dover* above quoted is not law; for in 2 Rep. 11. *Magd. Coll. case*, it is adjudged, that the fine does not bar the college, not being parties, because the 13 Eliz. makes void all acts which it suffers, and such sufferance extends to the act in which they are not parties, by Sir Orl. b.—And Sir F. Moore, 467. reports the same case: and there by Walmesley it is said, that this issue is only bound in the time the fine is levied, but no other issue, and this by 34 H. 8; hence it seems, that Sir F. Moore or Lord Coke have misreported the case, for they are contrary to each other. Note, Mr. Palmer told Hen. Finch, afterwards Lord Nottingham and chancellor, that he attended Walter, chief baron, upon a reference, and that Walter denied the above case, and said, that the roll was *contra*, and the judgment there *contra* to this report, and that he and Palmer went to the house of Lord Coke, then living, and showed him the roll *contra* to his report in this place, and that he acknowledged it, and said, that he trusted to Serjeant Bridgman's report: whence it appears, that Sir F. Moore's report is the better, and there he reports it to have been, 39 Eliz. Ro. 1914."—Lord Nott. MSS.—[*Butler*, Note 325.]

[The case of *Stratford v. Dover* is reported in 1 Cro. 595. 612, but no judgment was given on the above point; and Justice Walmesley observed, that if such a doctrine were admitted, it would be a common mischief, for then tenants in tail of the gift of the crown might get themselves disseised, in which case a fine levied by the disseisor, would bar the issue. See 1 Sid. 166. 1 Rol. Rep. 171. 5 Cru. Dig. 494, 495.]—[*Ed.*]

tail made by the kings of England before the act (viz. had given and granted, &c.), and the body of the act referreth to the preamble (viz. that no such feigned recovery hereafter to be had against such tenant in tail,) so as this word (such) may seem to couple the body and the preamble together; yet in this case (such) shall be taken for such in
 (623)* "equal mischief, or in like case; and by divers parts of the act it appeareth, that the makers of the act intended to extend it to future gifts; and so is the law taken at this day without question (π).

Recovery suffered by tenant in tail without voucher, no bar of an estate tail.
 33 E. 3. Judgment, 292.
 8 H. 6. 55.
 10 H. 6. 5.
 14 E. 4. 5 b.
 15 E. 4. 8.
 F. N. B. 134 b. Pl. Com.
 237. 26 E. 3. 95.
 F. N. B. 231.

A recovery in a writ of right against tenant in tail without a voucher, is no bar of any gift in tail (ι).

If tenant in tail, the remainder over in fee, cesse, and the lord recover in a *cessavit*, this shall not bar the estate tail, for the issue shall recover in a *formedon*; neither were either of these bars when Littleton wrote.

(π) As these statutes deprive tenants in tail of the gift of the crown of all power of alienation, the judges have construed them strictly; and it is observable, that an estate tail of this kind is now the only perpetuity which can possibly be created. 5 Cru. Dig. 495. No alteration in the limitation of an estate tail, whereof the reversion continues in the crown, will enable the tenant in tail to bar his issue on the reversion. *Murrey v. Eytton and Price*, T. Raym. 260. Pollexf. 491. 2 Show. 104. Sir T. Jones, 237. And even at common law, by the prerogative of the crown, a reversion or remainder in the crown, either in fee or in tail, cannot be barred by common recovery, *Serjeant's case*, 2 Rol. Abr. 393. Hob. 339; though the recovery will operate so far as to convert the estate tail into a base or determinable fee, and bar the issue. *Neale v. Wilding*, 1 Wils. 275. The only mode of acquiring a good title to an estate tail whereof the reversion is in the crown, is, by an act of parliament, enacting that the reversion shall be divested out of the crown, and vested either in the tenant in tail, or in some other private person, by which means it will become barrable by a recovery. See 5 Cru. Dig. 503. Stat. 30 Geo. 3. c. 51.—[Ed.]

(ι) That a recovery suffered by tenant in tail, by his own default, or by confession, will not bar the estate tail, see acc. post, sect. 688. 360 b. 361 a. and b. and the note to fol. 354 b. post, Chap. 52; so that it is not only necessary that there shall be a voucher, but it is also material to the recovery, and essential to its operation as against the issue and persons in remainder, that the tenant in tail shall vouch some person to warranty, and have judgment to recover in value, so that there may be a recompense to descend in the same line as the estate tail would have descended. 1 Prest. Conv. 119. But to convey an estate, or to operate by *estoppel*, a voucher is not essential: or if there is a voucher it is not necessary that there shall be a voucher over, so as to give title to a recompense in value. Ibid. A common recovery may, at the same time, have two objects, one to bar an estate tail, &c. the other to pass an estate, as the jointure of a married woman, or to bar a right as a title of dower, or to extinguish a collateral estate as a rent-charge; and though it may be void as against the issue, for want of regular voucher, it may be good as a conveyance, or release, &c.; and it may also, and at the same time be good, as against the estate tail, &c. and also as a conveyance, though the recompense belongs wholly to the estate tail, and no benefit from the voucher is derived by the other persons. Ibid. 120. *Eare v. Snow*, Plow. 514. Fig. Rec. 35.—[Ed.]

CHAP. XLV.*

(624)*

OF ALIENATION BY SPECIAL CUSTOM.

(a) BRACTON, lib. 4. fol. 209. speaking of customary tenants, saith, *Dare autem non possunt tenementa sua, nec ex causâ donationis ad alios transferre non magis quàm villani puri; et unde si transferre debeant, restituant *ea domino vel ballivo, et ipsi ea tradant aliis in villenagium tenenda* (A). But although it be incident to the estate of a copyhold to pass, as our author (Sect. 74.) saith, by surrenders, (b) yet so forcible is custom, that by it a freehold and inheritance may also pass by surrender (1) (without the leave of the lord) in *his court, and be delivered over by the bailiff to the feoffee, according to the form of the deed, to be inrolled in the court or the like.

59 a.
Alienation by
surrender
the proper
mode of con-
veying copy-
hold estates,
(a) Bract. lib.
4. fol. 209. &
lib. 2. cap. 8.
ac. 14 H. 4. 34.
or customary
freeholds.

*59 b.
(b) Coram
Rege. Mich.
31 E. 3. Ra-
nolph. Hun-
tingfield's
case. 3 E. 3.
Corona, 310.
11 H. 4. 83.
per Thorne-
ing.

AND such a tenant (by copy) may not alien his land by deed, for then the lord may enter us into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after

(625)*
LITTLETON.
[Sect. 74.
58 a.]

(1) M. 9 Jac. C. B. n. 5. D. D. *Wilde and Francis. Adjudged accordingly, and the admittance is tenendum, but not ad voluntatem domini.* Hal. MSS.—Vid. acc. ante, 49 a. and note 6, there (Ante, p. 355, n. (54).), and also the books cited in Blackst. Law Tr. 8vo. ed. v. 1. p. 144. From these authorities it appears, that estates held by copy of court-roll, but not at the will of the lord, have been deemed freehold estates as well by others as by Lord Coke, and in order to distinguish them from the ordinary kind have been denominated *customary freeholds*. In consequence of the prevalence of this notion, a considerable number of such tenants some few years ago claimed a right of voting as *freeholders* at the election of knights of the shire. This gave occasion to

a short but most excellent treatise on the subject, in which the learned author traces the origin of lands held in this peculiar way, and proves, by the most clear and forcible arguments, that, though these tenures, in some respects resemble freeholds, they are in truth nothing more than a *superior* kind of copyhold. Soon after the publication of this treatise, the doctrine inserted in it received confirmation from an act of parliament, declaring, that no person holding by copy of court-roll should be entitled to vote at the election of knights of the shire. See Blackst. Law Tr. 8vo. ed. v. 1. p. 105. and 31 G. 2. c. 14.—[Hargr. n. 1. 59 b. (400).]

[As to customary freeholds, see ante, vol. 1. p. 658. n. (E), and the books there cited.]—[Ed.]

(A) We have seen, that copyholders being mere tenants at will, cannot alien their estates by feoffment, or other assurance at common law; but by the custom of all manors in which this kind of property is to be found, every copyholder has a power of transferring his estate to any other person, by surrendering or yielding it up to the lord of the manor, in trust that he may grant it out again to the person named in the surrender, which is therefore called an alienation by custom. Ante, 58 b. vol. 1. p. 663. The manner in which a copyhold is surrendered, is thus: the tenant, either in person or by attorney, surrenders his estate to the lord, or to his steward, or to certain tenants, according as the custom is, in trust to be again granted by him, or them, to such persons, and for such uses, as are mentioned in the surrender. This surrender must be presented by the jury, or homage of the manor, and found by them upon their oaths, and then the lord grants the land to the person named in the surrender, to hold by the ancient rent and customary services, and thereupon admits him tenant to the copyhold by the delivery of a rod, a glove, or the like, in the name of corporal seisin of the lands and tenements. 5 Cru. Dig. 533, 534. 2 Bl. Com. 366. 1 Watk. Copyh. 52. This mode of alienation therefore consists of three parts, the surrender, the presentment, and the admittance; which will be severally considered in the course of this chapter.—[Ed.]

(1 Rol. Abr. 509.) *the custom to surrender the tenements in court, &c. into the hands of the lord, to the use of him that shall have the estate, in this form, or to this effect.*

Form of the
surrender.

A. of B. cometh into this court, and surrendereth in the same court a mease, &c. into the hands of the lord, to the use of C. of D. and his heirs, or the heirs issuing of his body, or for term of life, &c. And upon that cometh the aforesaid C. of D. and taketh of the lord in the same court the aforesaid mease, &c. To have and to hold to him and to his heirs, or to him and to his heirs issuing of his body, or to him for term of life, at the lord's will, after the custom of the manor to do and yield therefore the rents, services, and customs thereof before due and accustomed, &c. and [COKE, 59 b.] *giveth the lord for a fine, &c. (For the signification of this word (finis), vide Sect. 174. 182. 194. 441.) and maketh unto the lord his fealty, &c. (B).*

(B) A surrender is defined to be, the yielding up of an estate by the tenant to the lord, either as a relinquishment or resignation of such estate, or as the means of conveying or transferring it to another. 1 Watk. Copy. 53. Lord Coke, in another work, says, that the word *surrender* is *vocabulum artis*, and therefore where a surrender is necessary, if this word be wanting, all other words used in ordinary conveyances are insufficient to convey a copyhold estate, Cop. s. 39; but it should seem from other books, that any words manifesting such intention, whether they are spoken in court, or out of court, before a person who is *authorized* to take a surrender out of court (see Watk. Gilb. Ten. 273, 274. 450), will operate as a surrender, provided it be not prejudicial to the rights of third persons. 1 Watk. Cop. 54. 57. Gilb. Ten. 252. 311. *Zinzon v. Talmash*, Sir T. Jones Rep. 142. But the words must be expressive of an actual and immediate relinquishment of the premises, for if he only says he is content to surrender, or the like, it will not amount to a surrender in law. Calth. 58. Gilb. Ten. 252. So it is if a copyholder covenant to surrender, *Zinzon v. Talmash*, 2 Show. 131; though the covenant be presented by the homage. *The King v. The Lord of the Manor of Hendon*, 2 T. R. 484. A copyhold may be surrendered by implication; as if a copyholder in fee comes into court, and accepts a new copy, to himself for life, remainder to his wife for life, remainder to his son for life, this amounts to a surrender to the use of himself for life, &c. 1 Watk. Cop. 58; but the reversion continues in him (Gilb. Ten. 254), for had an actual surrender been made, no more would have passed than would have satisfied the uses declared (Watk. Gilb. Ten. 450), and no further surrenders shall be implied than is requisite to give effect to the new uses or estates. 1 Watk. Cop. 58.

With respect to what may be surrendered, it is observable, that nothing can properly be surrendered but a legal estate; it is not however necessary that such legal estate should be in possession, it is sufficient if it be vested; and therefore an estate in remainder or reversion may be surrendered. 5 Cru. Dig. 538. So the reversioner being in of his old estate (9 Co. 107 a), or a remainder-man on admission of the particular tenant, may surrender that reversion or remainder to another, without a personal admittance of themselves. *Gyppen v. Bunney*, Cro. Eliz. 504. *Colchin v. Colchin*, 3 Leon. 239. Ibid. 662. *Butler v. Lightfoot*, 3 Leon. 239. *Hegger v. Felston*, 4 Leon. 111. So the heir of a reversioner or remainder-man may surrender before his own admittance on satisfying the lord for his fine. *Gyppen v. Bunney*, supra. But the surrenderee of a reversion or remainder, cannot properly surrender before his own admission, he having never been accepted as a tenant, 1 Watk. Cop. 59, 60: nor can a person, who has only an equity, or right, or authority, surrender, but such equitable interest may be assigned or devised (*Hawkins v. Leigh*, 1 Atk. 388. *Macey v. Shurmer*, Ibid. 389. *Tuffnell v. Page*, 2 Ibid. 38. *Cor v. Ellison*, 3 Ibid. 73. *Allen v. Poulton*, 1 Ves. 121. *Gibson v. Lord Montford*, Ibid. 490. *Roe v. Lowe*, 1 H. Bl. 461), and such power may be exercised (*Holder, d. Sulyard v. Preston*, 2 Wils. 400), without a surrender; nor can a person, who has a mere possibility, surrender as an heir in the life-time of his ancestor, for a surrender shall not operate as an estoppel. *Goodtitle v. Morse*, 3 T. R. 365. *Doe, d. Ibbott v. Cowling*, 6 T. R. 63. *Morse v. Faulkner*, 1 Anstr. 11; nor can a surrenderee before his own admittance surrender to the use of

* "*Into the hands of the lord.*" *Dominus manerii*, the lord of a manor, is described (c) by Fleta as he ought to be *in these words. (626)*
In omnibus autem et supra omnia decet quemlibet dominum 59 b.
verbis esse veracem, et in operibus fidelem, Deum et justitiam Who may take surrenders.
amantem, fraudem et peccatum odientem, voluntariosque, male- (c) Fleta, lib. 2. cap. 65 & 71.
volos, et injuriosos contemnentem, et apud proximos pietatem (627)*

another; though, it seems, that if the lord accept the surrender of the cestui que trust, it may be an implied admission on the first surrender. See *Watk. Gilb. Ten.* 163. 275. 281. 457. 1 *Watk. Cop.* 61. Rents also, we have seen, cannot properly be surrendered. *Ante*, vol. 1. p. 662. n. (1).

With regard to the persons by whom surrenders may be made;—all persons who are capable of conveying their estates by any common law assurance, are capable of making a surrender. But if an infant make a surrender, he may enter at full age without suit, though the surrenderee be admitted, *Gooles v. Grave*, Moor. 597. *Bullock v. Dibler*, Poph. 39. *Knight and Footman*, 1 Leon. 95; but an infant may be ordered by the court of chancery to surrender a copyhold which he has as trustee or mortgagee. *Doe, d. Harman v. Morgan*, 7 T. R. 103. *Naylor v. Stode*, 2 Ch. Rep. 392. So by the general custom (*Smithson v. Cage*, Cro. Jac. 526), a husband and wife may surrender the wife's copyhold, provided the wife is privately examined by the steward, (*Gilb. Ten.* 277. 312. *Compton v. Collinson*, 1 H. Bl. 334), or by a person deputed by the steward, to take such surrender and examination. *Burgess and Foster*, 1 Leon. 289. *Burdett's case*, Cro. Eliz. 48. And by special custom such surrender and examination will be good, though taken out of a court before two tenants of the manor, *Erish v. Rives*, Cro. Eliz. 717; or though the feme covert be an infant. 1 H. Bl. 345. But a custom for a married woman to surrender her copyhold lands, without the assent of her husband, is void. *Stephens, d. Wise v. Tyrrell*, 2 Wils. 1. Where a copyhold is settled on a woman for her own separate use, in such case she may surrender it without her husband. *Compton v. Collinson*, 2 Bro. C. C. 377. 1 H. Bl. 341. 351. So in other cases she alone may surrender her copyhold estate, with the consent of her husband. *Skipwith's case*, 3 Leon. 81. S. C. 4 Ibid. 148. Godb. 14. 143. *Taylor v. Phillips*, 1 Ves. 229. *George v. —*, Ambl. 628. *Compton v. Collinson*, supra. And if the husband be present at such surrender, it will be sufficient proof of his assent. *Taylor v. Phillips*, supra. So, if the husband and wife agree to live separate, and the husband thereupon covenants that the wife shall therefore enjoy to her own use her real estates, &c. after such covenant her surrender shall be taken to be with his assent, *Compton v. Collinson*, supra; and by custom such a surrender is good. Moor. 123. 2 Bro. C. C. 377. 387. 1 *Watk. Cop.* 64. But a surrender by the husband is no discontinuance of his wife's estate; but on his decease, his widow or her heir may enter. 4 Leon. 88. 4 Co. 23 a. A husband may surrender to the use of his wife, 4 Co. 29 b. Co. Cop. s. 35. *Gilb. Ten.* 220; or the wife, where the custom authorizes her to surrender, may surrender to the use of her husband, for the conveyance is through the intervention of the lord. 1 *Watk. Cop.* 65. But the lord cannot grant to his own wife. *Firetrap d. Symes v. Pennant*, 2 Wils. 254. A joint-tenant may surrender to the use of his companion. *Kitch.* 86 a. Co. Cop. s. 35. And except where the copyholder is under any personal incapacity, as non compos, coverture, or infancy, or possesses a bare power or authority to sell, (Co. Cop. s. 34. 9 Co. 75 b.), a surrender may be made by attorney, as well as in proper person, Co. Cop. s. 34. *Combe's case*, 9 Co. 75. A person, however, cannot surrender by attorney, where he cannot surrender in person without a special custom. And therefore, though he may surrender by attorney in court, (9 Co. 75 b.), or to the lord (*Gilb. Ten.* 251, 252), or steward (*Combe's case*, 9 Co. 75 b. *Dudfield v. Andrews*, 1 Salk. 184. *Tukely v. Hawkins*, 1 Ld. Raym. 76), out of it, by attorney. 1 *Watk. Cop.* 67; yet he cannot surrender by attorney to two tenants, (*Combe's case*, 9 Co. 75 b. Co. Cop. s. 34. *Gilb. Ten.* 252), or to the bailiff or reeve of the manor, without a special custom to warrant it; for in these cases a special custom would be necessary to warrant the surrender of the copyholder himself, and, therefore, a surrender by attorney would not be good without a further custom for doing so. 1 *Watk. Cop.* 68. The attorney, it seems, must be appointed by deed, *infra*, 59 a.; and he ought to pursue the usual customs as to form, and ought to make the surrender in the name of his principal, not in his own name; or show his authority, and say he surrenders the copyhold by force of such authority. *Parker v. Kett*, 9 Co. 76 b. 1 Salk. 95, 96. But a purchaser of a copyhold is not obliged to accept of a surrender by attorney, *Mitchel v. Neale*, 2 Ves. 679.—[Ed.]

vultumque motibilem et plenum ; ipsius enim interest potius consilio quàm viribus uti, proprio arbitrio. Non conjuslibet voluntarii juvenis menestrali, vel adulatoris, sed jurisperitorum virorum fidelium et honestorum, et in pluribus expertorum, consilio debet favere. Qui bene sibi vult disponere et familiæ suæ, scire veram executionem terrarum suarum necessarium erit, ut perinde sciat quantitatem suarum facultatum et finem annuarum expensarum. And the residue is fit for every lord of a manor to know and follow, which were too long here to be recited ; only his conclusion having spoken of the lord's revenue and expenses, I will add, *Quæ omnia distinctè scribantur in membranis, ut perinde sagaciùs vitam suam disponat et faciliùs convincat mencia compostariorum.*

Lord of a manor pro tempore may take surrenders.

(d) See more of this 4 Co. the case of copyholders Trin. 1 J. R. 854. Inter Shapland & Bidler in repl. in Com. Banco, the case of the Guardian in Socage adjudged. (Cro. Jam. 98. 6 Co. 60 b.) (628)*

(d) If the lord of the manor for the time being be lessee for life or for years, guardian, or any that hath any particular interest, or tenant at will of a manor (all of which are accounted* in law *domini pro tempore*) (c), and do take a surrender into his hands, and before admittance the lessee for life dieth, or the year's interest or custody do end or determine, or the will is determined, though the lord cometh in above the lease for life or for years, the custody, or other particular interest, or tenancy at will, yet shall he be compelled (2)

(2) "Nota, ruled, that action on the case doth not lie against the lord who refuses to admit, but the remedy is to compel him in chancery. P. 13 Jac. B. R. Crook. n. 1. *Ford and Hoskins*." Hal. MSS.—See Cro. Jam. 368. and S. C. Mo. 842. 2 Bulstr. 336. But it is said to have been adjudged, that though *surrenderee* cannot have action on the case against the lord for refusing to admit, yet the *surrendoror* may. 3 Bulstr. 217.—[Hargr. n. 6. 59 b. (402).]

[And now the lord is not only compellable by subpoena in equity, but by *mandamus* at law, to admit the person named. *The King v. The Lord of the Manor of Hendon*, 2 T. R. 384. 4 Burr. 1961. But before the tenant can compel an admission, the person appointed, and the estate he is to take, must be such as the surrenderor would be warranted in appointing. 1 Watk. Copy. 241. Therefore if a copyholder for life surrender to the use of another for the life of that person, the lord may refuse to receive such surrender, or to admit the surrenderee. Watk. Gilb. Ten. 451. 1 Watk. Cop. 241. So it seems the lord would be justified in refusing to admit, on a surrender by a copyholder in

fee to the use of a corporation, aggregate, or sole, enabled by license to hold lands. *Ibid*. But if a surrender be made to the use of a person for years, or if a surrender be made to the use of a will, and the testator devise to a person for years, the lord would be compellable to admit him, equally as if he had taken for life. 4 Co. 23 a. Co. Copy. s. 47. *Hanchett's case*, Dy. 251 a. *Baltimore v. Graves*, 1 Vent. 260. 1 Watk. Copy. 243. But the court will not grant a *mandamus* to compel the admission of an heir at law, as the heir has as good a title without admittance as with it, against all the world but the lord. *The King v. Remett*, 2 T. R. 197. *Knight v. Bate*, Cowp. 741. And wherever any person becomes entitled to the copyhold by act of law, as an executor (*Hanchett's case*, Dy. 251.), a widow taking free-bench, in cases in which no assignment is requisite (See Watk. Gilb. Ten. 287, 288. 373.), a husband in right of marriage, or by the curtesy, such person may enter, &c. as an heir at law might have done. See *Hanchett's case*, supra. Co. Cop. s. 56. Watk. Gilb. Ten. 291, 461. Watk. Desc. 53, 54. 1 Watk. Copy. 247.]—[Ed.]

(c) It is immaterial whether the lord to whom a surrender is made, holds in fee, or for years, at will, or by sufferance, whether he has an absolute or defeasible title, or none at all, as if he be an abator, intruder, or disseisor, whether he has any interest or not in the manor, or whether he is an *infant* or of *full age*, for the lord, in such case, is merely an instrument. 4 Co. 23 b. 24 a. Ante, 58 b. vol. 1. 662, 663. But he must be lord, either by right or by wrong; and therefore if the freehold of a particular tenement held by copy

to make admittance according to the surrender; and so was it holden in 17 Eliz. in the Earl of Arundel's case, which I myself heard.

The lord of the manor may make admittances out of court *and out of the manor also (3), as at large appeareth in my Reports.

Seneschal, (which we call a steward), *seneschallus*, is derived of *sein*, a house or place, and *schale*, an officer or governor. Some say that *sen* is an ancient word for justice, so as *seneschal* should signify *officiarius justitiæ*; and some say that steward is derived of *stewe*, (that is) a place, and *ward*, that signifieth a keeper, warden, or governor; and others, that it is derived of *stede*, that signifieth a place also, and *ward*, as it were the keeper or governor of that place. But it is a word *of many significations. In this place it signifieth an officer of justice, viz. a keeper of courts, &c. Fleta describeth the office and duty of this officer at large most excellently: *Provideat sibi dominus de seneschallo circumspecto et fidei, viro provido et discreto et gratioso, humili, pudico, pacifico, et modesto, qui in legibus consuetudinibusque provincie et officio seneschalcie se cognoscat, et jura domini sui in omnibus tueri affectet quique subballivos domini in suis erroribus et ambiguis sciat instruere et docere, quique egenis parcere, et qui nec prece vel pretio velit à tramite justitiæ deviare, et perversè judicare; cujus officium est curias tenere manerium; et de subtractionibus consuetudinum, servitiorum, reddituum, sectarum ad cur,' mercata, molendina domini et ad visus francpledg' aliarumque libertatum domino pertinentium inquiret, &c.* The residue pertaining to his office is worth your reading at large. Every steward of courts is either by deed or without deed (4); for a man may be retained a steward to keep his court baron and leet also belonging to the manor without deed, and that retainer shall continue until he be discharged (D).

61 b.
The lord may take surrenders out of court.
(629)*
61 a.
Steward of a manor, his office and duties.

*61 b.
Vid. sect. 92 & 93. Fleta, lib. 2. cap. 66. Vid. Stat. de Extent. manor. 14 E. 1.

how appointed. Vid. 4 Co. Cases de Copyholds, fol. 26, 27. 30.

AND also in divers lordships and manors there is this custom, (630)

(3) See post, 59 a. and n. (11) there.

further title *Stewards of Courts*, in Vin. Abr.

(4) But a patent is necessary to the making of stewards of the king's manors. See

F. and Com. Dig. *Copyhold*, R. 5.—[Hargr. n. 1. 61 b. (410).]

be granted to a stranger, such grantee cannot take a surrender; for as he has no manor, he is not *dominus pro tempore*. *Murrell v. Smith*, 4 Co. 25 a. S. C. Cro. Eliz. 252. 1 Watk. Cop. 74. Ante, vol. 1. p. 658. n. (F). See further as to the persons by whom copyhold estates may be granted, Co. Cop. s. 34. Vin. Abr. Copy. (G), (1 b. 3). Com. Dig. Copy. (C 3). Ante, 58 b. vol. 1. p. 662, 663, and the books cited in the notes there.—[Ed.]

(D) A steward, as incident to his office, may, by the general custom of all manors, take a surrender out of court (*Dudfield v. Andrews*, 1 Salk. 184. Infra, 59 a. n. 11.), or even out of the manor (*Tukely v. Hawkins*, 1 Ld. Raym. 76), though he be appointed by parol. 4 Co. 30 b. So a surrender will be good if made to a deputy steward, *Parker v. Keck*, 1 Com. Rep. 84. S. C. 1 Ld. Raym. 658. 1 Salk. 95. Et vid. Moor. 112; or to a person appointed by a deputy steward, though it be taken out of the kingdom. *Heggor v. Felston*, 4 Leon. 111. But a surrender out of court by the hands of the bailiff or reeve, or of two tenants, or of one tenant, of the manor, must be warranted by a special custom. Infra, 59 a. Co. Copy. s. 34. Tr. 79. 6 Co. 76 a. b. Kitch. 102 b. 1 Rol. Abr. Rep. 125.—[Ed.]

LITTLETON.
[Sect. 79.
61 b.]

Surrender by
custom may
be made to
the bailiff, or
two tenants
of the manor,
out of court.

[COKE,
62 a.]

viz. if such a tenant, which holdeth by custom, will alien his lands or tenements, he may surrender his tenements to the bailiff, or to the reeve. (Littleton intendeth into the hands of the lord by the bailiff, or the reeve) or to two honest men of the same lordship, to the use of him which shall have the land, to have in fee-simple, fee-tail, or for term of life, &c. And they shall present all this at the next court, and then he, which shall have the land by copy of court roll, shall have the same according to the intent of the surrender.

62 a.
Vid. 4 Co.
26 Kite and
Quaintin's
case.
Such surren-
der made out
of court must
be presented
at the next
court.
(4 Co. 29 a.)
On present-
ment at the
next court,
(631)*
the surren-

The custom doth guide these surrenders out of court, and the custom must be pursued.

"And they shall present all this at the next court." By the surrender out of court, the copyhold estate passeth to the lord under a secret condition that it be presented at the next court according to the custom of the manor (x). And therefore if after such a surrender, and before the next court, he that made the surrender dieth, yet the surrender standeth good (5); *and if it be presented at the next

(5) "But-vide Trin. 7 Car. B. R. Rot. 373. Adjudged M. 8. Crook. n. 27. *Burgoin and Spurling*. A. surrenders to the steward out of court to the use of B. on condition, and before the next court surrenders to the steward to the use of C. in fee; the condition is performed, and then he surrenders to the use of D. in fee by the hands of the steward; and at the next court all are present. Ruled, that C. shall have the land, for by the surrender the interest is bound, but the estate doth not pass till presentment, but remained fully in A. and so the surrender to C. is good, when the surrender to B. is avoided by performance of the condition before the court." Hal. MSS.—See note (2), in 60 a. (Ante, vol. 1. p. 653, 4.) See also as to the commencement of the surrenderee's estate, *Jeffrey's case*, in Wils. vol. 1. part 2, page 13. In that case one having surrendered to the use of his will devised a copyhold to Miss Jeffrey's in fee; and she being attainted of felony and hanged before admittance, the question was, whether her interest in the copyhold was such as to entitle the lord by

forfeiture. The whole court inclined against the lord, but did not give an absolute opinion. —[Hargr. n. 1. 62 a. (211).]

[It seems clear that the estate continues in the surrenderor till presentment and admission, 1 Watk. Copy. 86; and if a surrender be merely voluntary, the surrenderor may revoke it at any time before or after presentment, or at any time before admission, Kitch. 82 a; but in the case of a surrender for a valuable consideration, he is concluded as well at law (Kitch. 82 a. Co. Cop. s. 39. 2 Bl. Com. 368, 369. *Roe, d. Naden v. Griffiths*, 4 Burr. 1961. *Vaughan, d. Atkins v. Atkins*, 5 Burr. 2785. *Benson v. Scott*, Salk. 185. *Hobfast, d. Wollams v. Clapham*, 1 T. R. 601.) as in equity (*Taylor v. Wheeler*, 2 Salk. 449. 2 Vern. 564. *Jennings v. Moore*, 2 Vern. 609.) from revoking or countermanding his own deliberate act. 1 Watk. Copy. 87. 2 Bl. Com. 369. And the admission shall relate to the surrender so as to defeat the mesne acts of the surrenderor. *Benson v. Scott*, Carth. 275. *Vaughan, d. Atkins v. Atkins*, 5 Burr. 2764.]—[Ed.]

(x) When a surrender is made out of court into the hands of any who cannot thereupon make an admittance; as where it is made into the hands of tenants, or of those of the bailiff or reeve, or of any other person than the lord or steward, the surrender must be presented in court, in order to inform the lord or the steward that such surrender was taken. Co. Cop. s. 40. But as presentment is only for the information of the lord to give him notice of the surrender, (Gilb. Ten. 278), it seems, that no presentment is required, when the surrender is made to the lord, or steward, and admission is immediately made. *Rosewell v. Welch*, 1 Rol. Abr. Copy. (M), pl. 4, p. 502. S. C. 1 Rol. Rep. 514. 3 Bulstr. 214. Godb. 268. Watk. Gilb. Ten. 278, 279. 447. 449. But if the surrender be taken out of court by the lord, or steward, personally, and no immediate admission be made, the memorandum of the taking of such surrender, signed by the tenant who surrenders, and the lord

court, *Ce' que use* shall be admitted thereunto (f); but if it be not presented at the next court according to the custom, then the surrenderer becometh void (6); and so was it clearly holden Pasch. 14 Eliz. in the court of common pleas, which I myself heard (g).

Littleton, sect. 74, putteth an example of a surrender in court, and in this example three (e) things are to be observed.

First, that the surrender to the lord be general without expressing of any estate (7), for that he is but an instrument to admit *Cesty a que use*, for no more passeth to the lord, but to serve the limitation of the use (8); and *Ce' que use*, when he is admitted, shall be in by him that made the surrender, and not by the lord (9).

(633)*
59 b.
Effect of a
surrender
and admis-
sion.
(e) Vid. 4 Co.
inter les
cases de
Copyholds.
The surren-
derer is in by
the surren-
deror, and
the lord is a
mere instrumen-
t.
(633)*

(6) See further as to the time of presenting surrenders, Vin. Abr. *Copyhold*, U. a. Com. Dig. *Copyhold*, F. 10.—[Hargr. n. 2. 62 a.]

[By the general custom of copyholds, the presentment must be made at the next court which is held after the surrender is made; but by special custom it may be at a subsequent one. Co. Cop. s. 40. 2 Ves. 302. 602. 680. And, although the surrender, if it be not certified within the time prescribed by the custom, will be void at law; yet the want of presentment will, under certain circumstances, be aided in equity. *Taylor v. Wheeler*, 2 Salk. 449. S. C. 2 Vern. 561. *Jennings v. Moore*, 2 Vern. 609. 1 Watk. Copy. 85. 88.]—[Ed.]

(7) "Copyholder for life surrenders to the use of D. the lord accepts the surrender, and admits D. for his life, who dies: adjudged,

that the surrenderor shall not have the land, but the lord, for he who surrendered had not any reversion. But if copyholder surrenders to the use of B. there on B.'s death the surrenderor shall have, for he hath the remainder. M. 6 Car. B. R. Crook n. 10. *King and Lord*," Hal. MSS.—See Cro. Cha. 204, and S. C. 1 Rol. Abr. 504. 2 Rol. Abr. 462. See 9 Co. 107. Vin. Abr. *Copyhold*, P. 6 Mod. 68. 1 Salk. 188. and Gilb. Ten. 3d Lond. ed. 257.—[Hargr. n. 2. 59 b (401).]

(8) See ante, 62 a. p. 630. and *Jefferie's case*, cited from Wils. in note 5.—[Hargr. n. 3. 59 b.]

(9) Acc. by Wilmut, Justice, in 4 Burr. vol. 3. p. 1543. and see further as to this, Yelv. 223. 4 Co. 27 b. Com. Dig. *Copyhold*, F. 14. and Gilb. Ten. 3d Lond. ed. 257.—[Hargr. n. 4. 59 b.]

or the steward taking it, should be produced and certified, on admittance being requested at a future time. And even if admittance be immediately made by the lord or steward taking such surrender, yet such admittance should be certified at the next court day for the information of the tenants; and it must be regularly inserted on the court rolls of the manor. 1 Watk. Cop. 81. Watk. Gilb. Ten. 449.—[Ed.]

(f) So it is though the surrenderee, or both the surrenderor and surrenderee happen to die before such presentment be made, 4 Co. 29 b. *Vaughan, d. Atkins v. Atkins*, 5 Burr. 2764. So if the persons to whom the surrender was made, die before presentment, yet it may be presented on good proof. *Frasel v. Welsh*, Cro. Jac. 403. Gilb. Ten. 220. Co. Cop. s. 40. And if they are living, and do not certify the taking, yet if it be satisfactorily proved to the court that such surrender was made, it is sufficient, Gilb. Ten. 280; provided this is done while such surrender continues in force (1 Watk. Cop. 84), and there be no special custom to confine such notification to the individuals who took such surrender. *Rosewell v. Welsh*, 3 Bulstr. 218.—[Ed.]

(g) As to admission.—When a surrender is duly presented in court by the homage or jury, the lord, by his steward, grants the copyhold so presented to the person to whose use it was surrendered; and thereupon admits him tenant to the copyhold, and the admittance is entered on the court rolls of the manor, 2 Bl. Com. 370. The acceptance of the new tenant by the lord constitutes the essence of an admission, all the rest is mere form; and, therefore, any act of the lord showing his consent to the surrender, amounts to an implied admittance. Gilb. Ten. 282, 283. *Rosewell v. Welsh*, supra. S. C. Godb. 268, 269. *Ellan v. Westall*, 3 Bulstr. 232. 1 Rol. Abr. 505. *Rawlinson v. Greeces*, 3 Bulstr. 239. Dyer, 292 a. pl. 68. *Gyppen v. Runney*, Cro. Eliz. 504. And as the lord is not obliged to admit the tenant in his own person, so it is not necessary that the tenant be person-

On surrender, the limitation of the use being general, the surrenderee has but an estate for life.

Secondly, if the limitation of the use be general, then *Ce' que use* taketh but an estate for life, and therefore here Littleton expresseth upon the declaration of the use, the limitation of the estate, viz. in fee-simple, fee-tail, &c.

Surrender out of court by one joint-tenant to the use of his will, with presentment (after his death,) at the next court,

Thirdly, the lord cannot grant a larger (*f*) estate than is expressed

enures as a severance of the jointure by relation.
(*f*) Mich. 2 & 3 Ph. & M. in Com. Banco. by the whole Court in Constable's case of Pickenham, in Norfolk.

ally admitted. The lord, if he pleases, may admit him by attorney, though, it seems, the lord is not compellable to do so. *Coombe's case*, 9 Co. 76 a. *Floyer v. Hedingham*, 2 Rep. Ch. 56. But in the case of femes covert and infants by taking descent or surrender to a last will, he is now compellable to admit them by attorney, in certain cases, by statute 9 Geo. 1. cap. 29. In admitting a tenant, the lord is merely an instrument, whether the admittance be on a voluntary grant, or on a surrender or descent. In the former case, though the grant is dependant upon his will, yet the admittance upon such grant is wholly regulated by the custom, and the lord cannot vary the tenure or estate, nor the rents or services. 1 Watk. Cop. 281, 282. *Cook v. Younger*, Cro. Car. 16. Co. Copy. s. 41. 2 Bl. Com. 370. In the latter case he has only a power or authority to admit according to the surrender. He cannot vary the estate limited by the surrenderor, or grant it to a person whom the surrenderor has not designated. If he admit otherwise, though his act may bind himself, it will not be obligatory on others. If, therefore, a surrender be to the use of A. and the lord admit B. such admittance will be without warrant, and consequently void; and the lord may, notwithstanding such admittance, grant admittance again to A. If he admit A. and B., A. shall take the whole; and the admission of B. shall have no operation. So if the surrender had been to A. for life, and the lord admit him in fee, A. would only take for life agreeably to the surrender. In like manner, if the surrender had been to A. absolutely, and the lord admit him conditionally; or if the surrender had been on condition, and the lord admit him absolutely; the surrender shall control the admission. 1 Watk. Cop. 292, 283. 4 Co. 28 b. Co. Cop. s. 41. *Buddley v. Lepingwell*, 3 Burr. 1543. *Roe, d. Noden v. Griffiths*, 4 Burr. 1961. As to fines payable to the lord on the admission of copyhold tenants, see ante, 59 b. vol. 1. p. 666-669, and the notes there.

With respect to the effect of a surrender and admittance, we have seen, that a surrender and admittance, when made pursuant to the custom, operate as effectually in transferring a copyhold estate, as a feoffment or any other common law conveyance in respect of estate of freehold, supra. And where the admittance is on a descent, the person admitted is in by his ancestor (*Brown's case*, 4 Co. 22 b.), and on a surrender, by the surrenderor (Co. Copy. s. 41. Tr. 923. Burr. 1542. 4 Burr. 1961. 5 Burr. 2786), and not by the lord; and therefore he shall be paramount the lord's charges. Co. Copy. s. 41. Tr. 91. In like manner, he who is admitted on a grant, is, on such admittance, in by the custom; and therefore, not subject to any charges or incumbrances of the lord. *Swayn's case*, 8 Co. 63. Watk. Gilb. Ten. 430. 1 Watk. Copy. 45. 283. And as the surrenderee is, on admission, in by the surrenderor, so such admission shall relate to the surrender, and operate as from its date. *Benson v. Scott*, 1 Salk. 185. *Vaughan, d. Atkins v. Atkins*, 5 Burr. 2785. 2787. Therefore, if the surrenderor die between the surrender and admission, though his heir (as the surrenderor died seised of the premises) would take by descent, and his widow be entitled to dower, yet, on the admission of the surrenderee, the estate of the surrenderor would be defeated; and consequently the descent and title to dower would be also defeated. *Benson v. Scott*, Carth. 275. S. C. 3 Leon. 385. 1 Salk. 185. 12 Mod. 49. *Vaughan, d. Atkins v. Atkins*, supra. And, on the other hand, should the surrenderee die before admission, his heir would be entitled to admission; and when admitted would be in by descent; and the widow of the surrenderee shall have her free-bench. Gilb. Ten. 320. 288. *Vaughan, d. Atkins v. Atkins*, supra. So, on such admission, all mesne acts of the surrenderor (*Benson v. Scott*, supra), and of the lord (*Granth v. Copley*, 2 Saund. 423), would be defeated, and those of the surrenderee are confirmed, 1 Watk. Copy. 103, 104. 284. After admittance, therefore, such surrenderee may lay his demise between the time of surrender and admittance, and recover the mesne profits from the time when the surrender was made. *Holdfast, d. Wooliams v. Clapham*, 1 T. R. 600. *Roe, d. Jeffereys v. Hicks*, 2 Wils. 15. And an admittance of the surrenderee before trial, will maintain ejectment brought by him before admittance, upon a demise laid between the time of surrender and admittance. *Doe, d. Bennington v. Hall*, 16 East. 208.—[Ed.]

in the limitation of the use. Littleton here putteth his case of one. If two joint-tenants be of copyhold lands in fee, and the one out of court according to the custom surrender his part to the lord's hands, to the use of his last will, and by his will deviseth his part to a stranger in fee, and dieth, and at the next court the surrender is presented, by the surrender and presentment the jointure was severed, and the devisee ought to be admitted to the moiety of the lands, for now by relation the state of the land was bound by the surrender (10) (H).

(10) "M. 3. Jac. B. R. Crook n. 30. *Porter and Porter*." Hal. MSS.—See Cro. Jam. 100. by which the case appears to have been adjudged according to Lord Coke's doctrine of relation. See further as to the relation of

Surrenders in Vin. Abr. *Copyhold*, T. b.—[Hargr. n. 5. 59 b.]

[See *Vaughan v. Atkins*, 5 Burr. 2764, in which Lord Coke's doctrine of relation is fully confirmed. Ante, p. 530, n. (5).]—[Ed.]

(H) With respect to the construction of surrenders, it may be further observed, that as a surrender is merely to effectuate the copyholder's alienation, no more passes by it than to answer the intent of the surrenderor: if the copyholder therefore surrender to the use of A. for life, or in tail, the residue, or part undisposed of, continues in him. So if he surrender to the use of his last will, and die without making a will, it will be the old estate, and descend to his customary heirs. 9 Co. 107 a. 1 Brownl. 181. Cro. Eliz. 148. Ibid. 442. 4 Co. 29 b. So if he surrender to particular uses with the ultimate limitation expressly to his own right heirs, they shall take such limitation as the old estate, and, consequently, by descent. *Roe, d. Noden v. Griffiths*, 4 Burr. 1952. 1960. Et vid. *Roe, d. Hucknall v. Foster*, 9 East, 405. Ante, vol. 2. p. 170, 1. n. 21. A surrender, we have seen, passes only what the tenant has a right to transfer, and cannot work a wrong. Ante, vol. 2. p. 143. n. (w 1). Neither can it work any alteration in the terms of the tenure itself; or vary the custom of the manor any more than an admittance; but both the tenant and the lord are equally bound by the custom. See 7 East, 429. With respect to the effects of a surrender as it regards the surrenderee, it is to be observed, that the surrenderee takes merely as a *nominee* or *appointee*, and not properly as a *cestui que use*. A surrender, therefore, is not to receive a construction similar to that of an use or trust. Per Holt, C. J. *Fisher v. Wigg*, 1 P. Wms. 17. 1 Ld. Raym. 627; and by Hardwicke, C. *Rigden v. Vallier*, 2 Ves. 357. The surrenderee, before admission, was said to have neither *jus in re* nor *ad rem*; he could not enter upon the land, without being regarded as a trespasser, *Berry v. Greene*, Cro. Eliz. 349. Co. Copy. s. 39. T. 87; unless by consent of the surrenderor, in which case he was considered as his tenant at will. Watk. Gilb. Ten. 460. The surrenderee could not maintain trespass, 1 Watk. Copy. 94. 101. *Berry v. Greene*, sup.; nor surrender (*Wilson v. Waddell*, 1 Brownl. 143. 1 Watk. Cop. 101.) or forfeit his interest. Ibid. *Roe, d. Jeffereys v. Hicks*, 2 Wils. 13. 16. But the surrenderee is now regarded as having such an interest in the premises as may be devised (*Davies v. Beversham*, 3 Ch. Rep. 4. S. C. Nels. Ch. Rep. 76. 2 Freem. 157. Et vid. *Holdfast d. Woollams v. Clapham*, 1 T. R. 601. *Roe, d. Noden v. Griffiths*, 4 Burr. 1952. 1 Bl. Rep. 605. 1 Ves. jun. 254), or assigned. *The King v. The Lord of the Manor of Hendon*, 2 T. R. 484. Watk. Gilb. Ten. 285. 458. So, we have seen, his admission shall relate to the date of the surrender. Sup. p. 630, 1. n. (5). With respect to the description of the surrenderee, if from the description given the person may be ascertained, it is all that is requisite. Therefore a surrender made to the lord archbishop of Canterbury, or the lord mayor of London, or the high sheriff of Norfolk, without mentioning either the christian name or surname, is good enough; because they are certainly known by this name, without further addition. In like manner, a surrender by a person to the use of his wife, or to the use of his brother or sister, having but one brother or sister, or to the use of his next of blood, is good. So if a man surrender to the use of his son W. having more sons than one of that name; yet this uncertainty may be helped by an averment. See 1 Watk. Cop. 107. 5 Co. 68 b. *Roe, d. Hucknall v. Foster*, 9 East, 405. So a person may surrender to such uses as the lord shall name, (Lit. Rep. 26.) or as A. shall by will appoint. *Otway v. Hudson*, 2 Vern. 583. But if he surrender to the use of his cousin or his friend; or in the disjunctive to the use of I. S. or I. N., it will be void for the uncertainty. Co. Copy. s. 35. Tr. 80. 82. With respect to the limitation of the use, the same words

- (634)* 59 b. Custom to surrender need not be alleged in pleading, unless surrender made to the steward, &c. out of court. (g) Bract. lib. 2. cap. 8. & lib. 4. 49. 15 H. 4. 34. 1 H. 6. 11.
- *(g) This is the general custom of the realm, that every copyholder may surrender in court, and need not to allege any *custom therefor. So if out of court he surrender to the lord himself, he need not allege in pleading any custom. But if he surrender out of court into the hands of the lord by the hands of two or three, &c. copyholders, or by the hands of the bailiff or reeve, &c. or out of court by the hand of any other, these customs are particular, and therefore he must plead them (11).

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CHAP. XLVI.*

OF ALIENATION BY DEVISE.

- 111 a. Signification and etymology of the word devise. (45 Co. 73 b.)
- "DEVISER" is a French word, and signifieth *sermocinari*, to speak, for *testamentum est testatio mentis, et index animi sermo* (1). So as "to devise by his testament," is to speak by his testament, what his mind is to have done after his decease.

- (11) "Nota, by Rolle, surrender into the hands of the stewards, though out of the court, is good without custom. M. 24 Car. B. R. *Baker and Denham*." Hal. MSS. See acc. 1 Rol. Abr. 500. pl. 3, 4. Leon. 111. 1 Salk. 184. Some make a distinction between stewards by *deed* and stewards by *parol*, and think, that only the former can take surrenders out of court. Godb. 142. and 1 Ld. Raym. 159. But this distinction has been frequently denied, and indeed seems unsupported by any good reason. Cro. Jam. 526. Com. Rep. 85.—[Hargr. n. 6. 59 a. (399).]
- (1) See ante, fol. 110 a. vol. 1. p. 58. n. (5).

are, generally speaking, necessary to the creation of an estate in fee or in tail in copyhold lands, as in estates at common law, Co. Copy. s. 49. *Wright v. Kemp*, 3 T. R. 473. *Lovell v. Lovell*, 3 Atk. 11. *Idle v. Cooke*, 1 P. Wms. 70. *Sutton v. Stone*, 2 Atk. 101; unless in the case of a special custom. *Bunting v. Lepingwell*, 4 Co. 29 b. Kitch. 102 b. On a surrender being made, and no use expressed, the presumption of a relinquishment in favour of the lord (1 Watk. Copy. 92.) may be explained by admission. Ibid. 109. *Brown v. Foster*, Cro. Eliz. 392. Copyhold estates may be surrendered by way of mortgage; in which case the surrenderor continues the legal tenant till the mortgagee is admitted. *Wade's case*, 5 Co. 114. *Doe, d. Sheven v. Wroot*, 5 East, 132. 8 Ves. 30. But on admission the mortgagee acquires the legal estate, and on breach of the condition may enter, as assignee within the stat. 39 H. 8. Bull. N. P. 161. Watk. Gilb. Ten. 429. And in case the money be afterwards paid, there must be a resurrender by the former surrenderee; and a regular admission of the original surrenderor. *Doe v. Morgan*, 7 T. R. 103. On condition broken, the equity of redemption will follow the custom, as the legal estate would have done. *Fawcett v. Lowther*, 2 Ves. 300. That a surrender by way of mortgage, though not presented, will yet be a lien on the estate in equity, and will be good against the assignees of a bankrupt, see *Taylor v. Wheeler*, 2 Vern. 564. 1 P. Wms. 279. And that equity will supply the want of a surrender, in favour of a purchaser for a valuable consideration, against the party who ought to make the surrender, and also against his heir, see *Anon*, 2 Freem. 65. *Barker v. Hill*, 2 Ch. Rep. 218. *Taylor v. Wheeler*, sup. *Jennings v. Moore*, 2 Vern. 609. *Blenkarne v. Jennens*, 2 Bro. P. C. 278. *Patterson v. Thompson*, Finch, 272: *secus* in the case of a voluntary conveyance, unless the heir has done something to prevent the acceptance of the surrender. *Vane v. Fletcher*, 1 P. Wms. 352. That a disposition by will of copyhold estate is effectual without a previous surrender to the uses of the will, by stat. 55 Geo. 3. c. 192, see ante, vol. 1. p. 150. n. (κ).—[Ed.]

But in law most commonly *ultima voluntas in scriptis* is used where lands or tenements are devised, and *testamentum* when it concerneth chattels.

And well said Littleton (section 167), that lands and tenements were devisable in burghs by custom; for that (a) at the common law no lands or tenements were devisable by any last will and testament (2), nor ought to be transferred from one to *another, but by

How distinguished from a testament.
111 b.
At common law, no lands were devisable except by custom.
(a) 27 H. 8. cap. 10. Brit. fol. 212. 78 b. 164. Vid. before in this sect. 32 H. 8. cap. 2. 34 H. 8. cap. 8.
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(2) The *testamentary* power over *land* was certainly in use among our Anglo-Saxon and Danish ancestors; though it seems to have been rather adopted from the remnant of the Roman laws and customs they found here, than brought from their own country: for as Tacitus, writing of the ancient Germans, says *successores sui cuique liberi et nullum testamentum*. Spelm. Posthum. 21. 127. After the Norman Conquest, the power of devising land ceased, except as to *socage* lands in some particular places, such as cities and boroughs, in which it was still preserved; and also except as to *terms for years or chattel interests* in lands, which, on account of their original imbecility and insignificance, were deemed personalty, and as such were ever disposable by will. This limitation of the testamentary power proceeded, partly from the solemn form of transferring land by livery of seisin introduced at the Conquest, which could not be complied with in the case of a last will; partly from a jealousy of death-bed dispositions; but principally from the general restraint of alienation incident to the rigors of the feudal system, as it was established or at least perfected by the first William. See Wright's Ten. 172. In the reign of Edward the First, the statute of *Quia emptores* removed in great measure this latter bar to the exercise of testamentary power; that is, in respect to all *freeholders*, except the king's tenants in *capite*. But the two former obstructions still continued to operate; though indeed this was in *name* and *appearance* only; for soon after the statute of *Quia emptores*, feoffments to *uses* came into fashion, and, last wills were enforced in chancery as good declarations of the *use*; and thus through the *medium of uses* the power of devising was continually exercised in *effect* and *reality*. But at length this practice was checked, not *accidentally*, but *designedly*, by the 27th of Hen. 8. which, by transferring the *possession* or *legal estate* to the *use*, necessarily and compulsively consolidated them into one, and so had the effect of wholly destroying all distinction between them, till the means to evade the statute,

and, by a very strained construction, to make its operation dependent on the intention of parties, were invented. However, the bent of the times was so strong in favour of every kind of alienation, that the legislature, in a few years after having interposed to restrain an *indirect* mode of passing land by last wills, expressly made it devisable. This great change of the common law was effected by the statutes of the 32 and 34 of Henry 8. which taken together gave the power of devising to all having estates in fee-simple, except in *joint-tenancy*, over the *whole* of their *socage* land, and over *two-thirds* of their lands holden by *knight-service*. The operation of these statutes was further extended by the conversion of *knight's service* into *socage* in the 12 Cha. 2. But still *copyhold* lands, and also, as the best opinion seems to have been, estates *per autre vie* in *freehold* lands, remained undevisable. On the one hand, they were not devisable at *common law*; because they came within the description of *real estate*. On the other hand, they, or at least the former, are not within the *statutes* of Henry 8., these requiring, that the tenure should be *socage*, which a *copyhold* is not; and that the party should have an estate in *fee-simple*, which is more than a *tenant pur autre vie* can be said to have. See as to *copyhold* lands, 2 Rol. Rep. 383. and as to estates *pur autre vie* in freehold lands, Cro. Eliz. 804. Mo. 625. 1 Saund. 261. 1 Salk. 619. This defect of provision in the statutes of wills is now supplied as to estates *pur autre vie* by the 29 Ch. 2. c. 3. which makes them devisable in the same manner as estates in fee-simple. But no provision is yet made in respect to *copyhold* estates; and therefore the power of devising is now indirectly exercised over these by an application of the doctrine of *uses*, similar to that which was anciently resorted to in respect to freehold lands; for the practice is to surrender to the use of the owner's last will: and on this surrender, the will operates as a declaration of the use, and not as a devise of the land itself. See 2 Rol. Rep. 383. 2 Atk. 37. Gilb. on Uses, 36. From this

Alteration in the common law herein by stat. 32 & 34 H. 8.

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solemn livery of seisin, matter of record, or sufficient writing (3), but, as Littleton here saith, that by certain private customs in some burghs they are devisable. But now since Littleton wrote, by the statutes of 32 and '34 H. 8. lands and tenements are generally devisable (4) by the last will *in writing of the tenant in fee-simple,

deduction it appears, that the *testamentary* power is *now* exercisable, either *directly* or *indirectly*, over land of every tenure now in use, and also over every sort of interest in land, which, not being fettered with entails, can be transferred by alienation taking effect in the owner's life-time.—[Hargr. n. l. 111 b. (138).]

[That dispositions by will of copyhold estates are now effectual without previous surrenders, see stat. 55 Geo. 3. c. 192. Ante, vol. 1. p. 150. n. (κ).]—[*Ed.*]

(3) See note (2) *supra*.

(4) But a statute made since Lord Coke's time, requires a number of forms, besides *writing*, in a will of lands or tenements devisable by the *statute of wills*; for by the statute against frauds and perjuries a will of such property is void, unless it is *signed* by the testator, or by some person for him in his presence and by his direction, and is also *attested* and *subscribed* in his presence by three witnesses. See 29 Cha. 2. c. 3. Also by the last-mentioned statute the same forms are required, as well in devises by *custom* as in those of estates *pur autre vie*. But these regulations do not extend to *copyhold* estates and *terms for years*; the statute of Frauds and Perjuries, so far as it regulates devises of lands, being expressly confined to the three former kinds of devises. As to *copyholds*, a devise of them operates only as a declaration of uses on the surrender to the use of the will; and therefore if the form required by the surrender, which is usually nothing more than a testamentary declaration in writing, is observed, it is sufficient without any witness; and even a *nuncupative* will of copyholds was an effectual declaration of the uses, where the surrender was silent as to the form, till the 29 Cha. 2. required all declarations of trusts to be in *writing*. See 2 Atk. 37. and Barnad. Ch. Rep. 9. In respect to *terms for years*, they, falling within the description of personal estate, are disposable by will accordingly. But this must be understood with some distinction. Thus if they are terms, not in *gross*, but vested in trustees to *attend the inheritance*, they so follow the nature of the latter, that if the owner devises the land *generally* by a will not so attested as to pass the inheritance, not even the *trust* of the term will pass. See 2 P. Wms. 236. Also as to terms in *gross*, though a testator being pos-

sessed of such may *transmit* them by the same unsolemn kind of will as other personality, yet he cannot *create* them by will, without observing all the forms essential to a devise of real estate; because the interest, in right of which the testator creates the term, is *real* estate, and creating the term is a *partial* devise of it. Besides appointing new forms of executing wills of real estate, the 29 of Cha. 2. prescribes how devises shall be revoked.—[Hargr. n. 3. 111 b. (139).]

[The circumstances necessary to the validity of a devise, under the statute of Frauds, are, 1st, That it be written. But it is to be observed, that it is not material on what matter, or in what language, or character, a devise is written, so that the meaning be sufficiently apparent. *Masters v. Masters*, 1 P. Wms. 425. And it may be written at several times, and on different sheets of paper unconnected with each other; though that is not the proper mode. 6 Cru. Dig. 49. 2d. That it be signed by the party himself, or by some other in his presence, and by his express direction. Sealing is not necessary to a will, nor sufficient without signing. *Wright v. Wakeford*, 17 Ves. 458. If, however, the testator's name be written by himself in any part of the will, either at the beginning or the end, it will be a sufficient signing within the statute. *Lemayne v. Stanley*, 3 Lev. 1. *Grayson v. Atkinson*, 2 Ves. 454. *Morrison v. Turnour*, 18 Ves. 183. But the want of signing all the sheets of a will cannot be supplied; so that if a testator sign the two first sheets of his will, and is incapable of signing the others from illness, it cannot take effect. *Right v. Prior*, Dougl. 241. 3d. That it be attested by three witnesses, in the presence of the testator. Where the testator owns his handwriting before the witnesses, it is sufficient, though they do not see him sign his name. *Stonehouse v. Evelyn*, 3 P. Wms. 254. *Grayson v. Atkinson*, 2 Ves. 454. *Ellis v. Smith*, 1 Ves. jun. 10. And an attestation by the witnesses setting their marks to the will, is good within the statute. *Harrison v. Harrison*, 8 Ves. 185. Id. 504. Wills and codicils must be separately attested by three witnesses; for the attestation of two witnesses to a will, and of a third witness to a codicil thereto, is not sufficient. *Lea v. Libb*, Rep. Temp. Holt, 742. Nor can the

whereby the ancient (*b*) common law is altered, whereupon many (639) * difficult * questions, and most commonly disherison of heirs (when ^(b) Vld. 3 Co. 25, &c. in Butler & Baker's case. 6 Co. 1 Co. 25 a.

16 & 76. 8 Co. 84, 85. 9 Co. 133. 10 Co. 82, 83, 84. 11 Co. 24. 1 Co. 25 a.

attestation of a codicil annexed to a will operate in any case as the attestation of that will, *Attorney-General v. Barnes*, Gilb. Rep. 5. *Pimphrease v. Lansdown*, cit. 1 Com. Rep. 384. But if it appears that a will, consisting of several parts, made at different times, and separately signed by the testator, was intended to constitute but one will, an attestation of the last part by three witnesses will be sufficient. *Carlton v. Griffin*, 1 Bur. 549. The witnesses must see the whole will; though the presumption is, that all the sheets on which a will is written are in the room where the witnesses attest, unless the contrary be proved, 3 Mod. 263. *Bond v. Seawell*, 3 Burr. 1773. 1 Bl. Rep. 407. *Acherley v. Vernon*, Com. Rep. 381. And the witnesses must attest in the presence of the testator. *Broderick v. Broderick*, 1 P. Wms. 239. If, however, there be a possibility of the testator's seeing them attest, it will be sufficient, unless the contrary is proved. *Shires v. Glascock*, Salk. 688. 1 Ld. Raym. 507. *Longford v. Eyre*, 1 P. Wms. 740. *Casson v. Dade*, 1 Bro. C. C. 99. But where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, and the jury found that from one part of the testator's room, a person by inclining himself forwards with his head out at the door might have seen the witnesses, but that the testator was not in such a situation in the room that he might by so inclining have seen them; it was held, that the will was not duly attested. *Doe, d. Wright v. Manifold*, 1 Maul. & S. 294. It is not necessary that the fact of the witnesses having subscribed in the presence of the testator should be noticed in the attestation, *Hands v. James*, Com. Rep. 530. Willes, 1. *Croft v. Pawlet*, 2 Stra. 1109; neither is it requisite that they should all attest at the same time. *Anon.* 2 Ch. Rep. 109. *Cook v. Parsons*, Prec. in Ch. 184. *Jones v. Lake*, 2 Atk. 176. n. All persons, capable of being witnesses in any other manner, may also be witnesses to a will. And by stat. 25 Geo. 3. c. 6. devisees and legatees under a will are competent witnesses thereto, the devise, so far as concerns them, or any claiming under them, being declared void. And it has been recently determined, that a will was well attested, though one of the subscribing witnesses was executor in trust under the will. *Phipps v. Pitcher*, 1 Mad. Rep. 144. S. C. 6 Taunt. 290. Et vid. *Bettison v. Bromley*,

Bart. 13 East. 250. And by the same statute creditors may also be witnesses to wills charged with the payment of debts: the credit of all such witnesses being left to the consideration of the court and jury. Where one of the witnesses to a will had become insane, it was held, that his hand-writing might be proved, as he was to be considered as dead. *Bennett v. Taylor*, 1 Ves. jun. N. S. 381. Publication is also necessary to a will, that is, the testator must do some act from which it can be concluded that he intended the instrument to operate as his will. 3 Atk. 161. But the words, "signed and published by the said A. B. as and for his last will and testament" amount to a publication; and the delivery of a will as a deed has been held sufficient. *Peate v. Ouby*, Com. Rep. 196. *Trimmer v. Jackson*, 4 Burn. Ecc. L. 119. That wills that change lands are within the statute, see 2 Atk. 272. 2 Ves. 179; except that where a will duly executed contains a general charge on lands in aid of the personal estate, it will extend to legacies given by a subsequent will, or codicil not duly attested. *Brudenel v. Broughton*, 2 Atk. 268. 1 Burr. 423. Fearn. Op. 434. *Habergham v. Vincent and Stansfield*, 2 Ves. jun. 231. 236. 8 Ves. 495. That the statute extends to wills of trust estates, see *Wagstaff v. Wagstaff*, 2 P. Wms. 261. 3 Atk. 151. Ante, p. 638. n. (4): and to mortgages and equities of redemption, and money directed to be laid out in lands, see 6 Cru. Dig. 73. That wills made in a foreign country of lands in England, must be executed in the same manner as if made in England, see *Coppin v. Coppin*, 2 P. Wms. 293. But, we have seen, that a will to direct the uses of a surrender of a copyhold, or of a customary estate, passing by surrender, is not within the statute of Frauds, and need not be signed, unless such signature be required by the terms of the surrender to the uses of the will. Supra, p. 637. n. (2). *Doe, d. Cook v. Danvers*, 7 East. 298. 2 P. Wms. 258. *Cary v. Askew*, 2 P. Wms. 259. n. 1. *Tuffnell v. Page*, 2 Atk. 37.

With respect to the revocation of devises, it is to be observed, that there are three express modes of revoking a will.—1st. By a subsequent will duly executed according to the statute. But unless the second will contains a clause of revocation of all former wills, or makes some disposition inconsistent with the former will, it cannot operate as a revocation thereof, but both wills are

the devisors are pinched by the messengers of death,) do arise and

good. *Coward v. Marshall*, Cro. Eliz. 721. *Hungerford v. Noworthy*, Show. P. C. 146. Hardr. 374. Salk. 592. 3 Mod. 203. *Goodright v. Harwood*, 3 Wils. 497. 2 Bl. Rep. 937. Cowp. 87. 7 Bro. P. C. 489. But where it appears in a subsequent will, that it was the intention of the testator to revoke a former one, it is sufficient, though such subsequent will should not take effect from the disability of the devisee. 1 Rol. Abr. 614. *Hoper v. Ratcliffe*, 10 Mod. 233. A codicil duly executed (see *Becket v. Harden*, 4 Maul. & S. 1.) has the same effect in revoking a former devise as a subsequent will. 3 Atk. 582. 1 Ves. 32. 178. But where there are two inconsistent wills of the same date, and no subsequent act of the testator to explain them, both will be void. *Phipps v. Earl of Anglesey*, 7 Bro. P. C. 443. 2dly. By an express declaration in writing that the testator means to revoke his will, which must be signed by him in the presence of three witnesses. *Hilton v. King*, 3 Lev. 86. To a declaration of this kind, it is not requisite that the witnesses should subscribe in the testator's presence. 1 P. Wms. 344. But a second will, though containing a clause revoking all former wills, will not operate as a revocation, unless it is executed so as to operate as a devise. *Egglesstone v. Speake*, 3 Mod. 258. 1 Show. 89. *Onions v. Tyrer*, 1 P. Williams, 343. 2 Vern. 741. 3dly. By cancelling, tearing, or obliterating it. But cancellation is an equivocal act, and will not amount to a revocation, unless it appears that it was done *animo cancellandi*. Cowp. 52. *Hyde v. Hyde*, 1 Ab. Eq. 409. *Onions v. Tyrer*, 1 P. Wms. 344. n. 1. Ante, p. 540. 1. n. (g 1). But any act of a testator by which he shows his intention to cancel his will, though it be not actually cancelled, will operate as a revocation. *Bibb v. Thomas*, 2 Bl. Rep. 1043. An obliteration of part, however, does not operate as a revocation of the whole, but only *pro tanto*. *Sutton v. Sutton*, Cowp. 812. *Larkins v. Larkins*, 3 Bos. & P. 16. *Short v. Smith*, 4 East. 419. Where there are duplicates of a will, and the testator cancels one part, it will be a revocation of the whole. 2 Vern. 742. 1 P. Wms. 346. And cancellation of a codicil is effectual, notwithstanding an interlineation to the same effect left standing in the will. *Utterson v. Utterson*, 3 Ves. 122. Besides these express modes of revoking a will, certain alterations in the situation of the testator, or in the estate devised, have been held to be implied revocations of a will. Thus marriage and the birth of a child, or

of a posthumous child (*Doe v. Lancashire*, 5 T. R. 49.), operate as an implied revocation of a will made during celibacy, on the presumed change in the testator's intention. *Christopher v. Christopher*, 4 Burr. 2182. *Spragge v. Stone*, Dougl. 35. Ambli. 721. But if this presumption is rebutted by other circumstances, the rule will not hold. *Brown v. Thompson*, 1 Ab. Eq. 413. *Brady v. Cubitt*, Dougl. 31. *Ex parte Lord Ilchester*, 7 Ves. 348.

Thus where A. by will provided an annuity for B. with whom he cohabited, and directed his trustee and executor out of his real estate, in case he should have any child or children by B., to raise £3000, to be paid to and amongst his said children, and devised the remainder of his estate over to several of his relatives: afterwards he married B. and had several children by her: it was held, that such subsequent marriage and births did not revoke his will; the objects having been therein contemplated and provided for. *Ke-nel v. Scrafton*, 2 East. 530. And it has been decided, that neither of those circumstances singly, as a subsequent marriage, or the subsequent birth of a child, will operate as an implied revocation of a will made before the marriage. *Doe, d. White v. Barford*, 4 Maul. & S. 10. *Jackson v. Hurlock*, Ambli. 487. A woman's will is revoked by marriage. *Forse v. Kembling*, 4 Co. 61. *Doe, d. Hodsdon v. Staple*, 2 T. R. 684; but if she survives her husband, the will is revived, and takes effect as if she had never been married. *Hodson v. Lloyd*, 2 Bro. C. C. 534. Plowd. 343. It is also a rule, that wherever a person who has devised an estate, afterwards makes an alteration in it, by any mode of conveyance whatever, inconsistent with the preceding devise; or by which such estate becomes in any respect different from what it was before; such an alienation will operate as a revocation of the prior devise. *Brydges v. Duchess of Chandos*, 2 Ves. jun. 417. 7 Bro. P. C. 505. *Goodtitle v. Otway*, 7 T. R. 399. 3 Ves. 682. 7 Bro. P. C. 593. *Doe, d. Dilnot v. Dilnot*, 2 N. R. 40. *Doe, d. Lushington v. Bishop of Llandaff*, 3 N. R. 491. And an agreement to convey, revokes a devise, as well as an actual conveyance. *Vawser v. Jeffrey*, 16 Ves. 519. *Cave v. Holford*, 3 Ves. 655. *Rider v. Wager*, 2 P. Wms. 328. *Cotter v. Loyer*, 2 P. Wms. 622. *Knollys v. Alcock*, 5 Ves. 648. And in such case parol evidence is not admissible to prove that the testator meant his will should remain in force. *Goodtitle v. Otway*, 2 Ves. jun. 606. 2 Hen. Bl. 516. But a fraudulent conveyance will not operate as

*happen. *But (c) the statutes take not away the custom to *devise (640)*
(641)*
(642)*

Devise by

custom, not taken away by these statutes.
(c) *Dyer*, 4 & 5 Phil. & Mar. 155. an. 6 Eliz. Dallison. Pasch. 20 El. between Barber and his wife, plaintiff, and William Long, defendant, in a writ of partition. Bendloe's adjudged. (9 Co. 133.)

a revocation, *Hawes v. Watt*, 3 Bro. C. C. 156; nor will a devise be revoked by an alteration of the quality of the estate, without varying the quantity of the interest, or the disposing power of the owner, 1 Rol. Abr. 616. pl. 3. Hence the acquisition of the legal estate alone (*Ambly*, 119. 3 Atk. 749. *Williams v. Owens*, 2 Ves. jun. 595.), or the change of a trustee (*Watts v. Fullarton*, Dougl. 718. *Parsons v. Freeman*, 3 Atk. 749. *Doe v. Pott*, Dougl. 709. Et vid. *Short*, d. *Gastrell v. Smith*, 4 East, 419.) or a partition, though corroborated by a fine (*Luther v. Kirby*, 8 Vin. 148. 2 P. Wms. 169. *Risley v. Balinglass*, Ld. Raym. 240.) unless it extends to other things (*Tickner v. Tickner*, cited 3 Atk. 742.) will not operate as a revocation. It may be further observed, that where the conveyance is but of part of the estate, or a lease of the lands, (*Hodgkinson v. Whood*, Cro. Car. 23. 1 Vern. 97., unless made to the devisee himself, *Coke v. Bullock*, Cro. Jac. 49.), or a mortgage in fee (*Hall v. Dunch*, 1 Vern. 329. 3 Atk. 805. 2 P. Wms. 334. *Harwood v. Oglander*, 6 Ves. 199. *Tucker v. Thurstan*, 17 Ves. 134., unless made to the devisee, which would be inconsistent with the devise, *Harkness v. Bayley*, Prec. Ch. 514.) or a conveyance for payment of debts merely, being for a particular purpose only, *Vernon v. Jones*, Prec. Ch. 32. *Ogle v. Cook*, cited 2 Bro. C. C. 592; will only operate as a partial revocation, or a revocation *pro tanto*, of the will. So if a testator having executed a devise of lands in the presence of three witnesses, to two persons as joint-tenants in fee, afterwards strike out the name of one of the devisees, and there be no republication; the erasure will only operate as a revocation of the will *pro tanto*, *Larkins v. Larkins*, 3 Bos. & Pull. 16. 109. That a devise of a real estate is not revoked by bankruptcy, see *Charman v. Charman*, 14 Ves. 580.

With respect to leasehold estates, it is settled, that a surrender of a lease for lives, and the taking a new lease, will operate as a revocation of a devise of the lease; for the testator by the surrender divests himself of his whole estate in the old lease, and acquires a new estate by the renewal. *Marrwood v. Turner*, 3 P. Wms. 163. So a purchase of a reversion expectant on a lease for lives, operates as a revocation *pro tanto* of a devise of such estates for lives. *Gallon v. Hancock*,

2 Atk. 424. So a surrender of a term for years, and the taking a new term, operates as a revocation thereof, *Abney v. Miller*, 2 Atk. 593. *Rudstone v. Anderson*, 2 Ves. 418. *Hone v. Medcraft*, 1 Bro. C. C. 261; unless it appears to have been the testator's intention to dispose of all terms, whereof he should die possessed, in which case a renewed term will pass. 6 Cru. Dig. 127. With respect to copyholds, though in general a surrender and admittance operate as a revocation, yet it has been determined that an admittance to a copyhold, grounded on a prior surrender, does not operate as a revocation of an intermediate will. 6 Cru. Dig. 127. *Thrustout v. Cunningham*, Fearn. Cont. Rem. 90.

Lastly, with respect to Republication; This has a twofold effect, 1st. To give a will all the effect of a will made at the time of its republication; and, 2dly. To set up and re-establish a will that has been revoked. 6 Cru. Dig. 129. Re-execution of a will is a republication of it; but it is settled that an express republication of a will must be attended with the same formalities as are necessary to its first publication. *Martin v. Savage*, 1 Ves. 440. So a codicil, duly attested, and annexed to a will, or referring to a will, (as "to be taken as part of the will," *Goodtitle*, d. *Woodhouse v. Meredith*, 2 Maul. & S. 5.) operates as a republication of such will, so as to pass lands purchased, or contracted to be purchased, between the dates of the will and codicil. *Acherley v. Vernon*, Com. Rep. 381. 3 Bro. P. C. 85. *Potter v. Potter*, 1 Ves. 437. *Barnes v. Crowe*, 1 Ves. jun. 486. 4 Bro. C. C. 2. *Piggott v. Waller*, 7 Ves. 98. *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 138. *Hulme v. Heygate*, 1 Meriv. 285. *Secus* where the effect of a codicil is confined to the lands devised by the will to which it is annexed. *Strathmore v. Bowes*, 7 T. R. 482. 2 Bos. & Pull. 500. *Piggott v. Waller*, 7 Ves. 124. Cancelling a second will republishes the first, *Goodright v. Glazier*, 4 Burr. 2512. But if the first will was cancelled, nothing but a re-execution of it will amount to a republication. *Burtenshaw v. Gilbert*, Cowp. 49. That an estate contracted for after a general devise will pass by a republication, and must be paid for out of the personal estate, see *Broome v. Monck*, 10 Ves. 605; and the devisee or heir will be entitled to the benefit of a contract for purchase, and to an application

What devise
good under
the stat. of
Wills.

(d) 6 Co. 17.
18. Sir Ed-
ward Clere's
case, 3 Co. 34
b. Butler and
Baker's case.

10 Co. 80, 81.
Leon. Lo-
vey's case.
(643)*

(5), whereof Littleton speaketh; for though lands devisable by custom be holden by knight-service, yet may the owner devise the whole land by force of the custom, and that shall stand good against the heir for the whole. But the devise of lands holden by knight-service by force of the statute is utterly void for a third, and the same shall descend to the heir. If he hath any lands holden by knight-service *in capite*, and lands in socage, he can devise but two parts of the whole; but if he hold lands by knight-service of the king, and not *in capite*, or of a mean lord, and hath also lands in socage, he may devise two parts of his land holden by knight-service, and all his socage lands. If he holds any land of the king *in capite*, and by act executed in his life-time he conveyeth any part of his lands to the use of his wife, or of his children, or payment of his debts, though it be with power of revocation, he can devise by his will (d) no more, but to make up the land so conveyed two parts of the whole. And if the lands so conveyed amount to two parts or more, then he can devise nothing by his will. But if he hath land only that is holden in socage, then he may devise by his will all his socage lands, so as it is apparent, that the benefit of the lords was more carefully provided for, than the good of the heir. But if a man, holding some land of the king by knight-service *in capite*, *convey two parts of his land to the use of his wife for life, now (as hath been said) he can devise no part of the residue, but yet he may by his will devise the reversion of the two parts so con-

of the personal estate in payment, if a title can be made, but not otherwise. S. C. Et vid. *Blount v. Bestland*, 5 Ves. 515, 516. *Rumbold v. Rumbold*, 3 Ves. 65. *Wilson v. Mount*, ibid. 191. *Pettitward v. Prescott*, 7 Ves. 541. *Sheddon v. Goodrich*, 8 Ves. 481. *Rich v. Cockell*, 9 Ves. 369. *Andrew v. Trinity Hall, Cambridge*, ibid. 533. *Blunt v. Clithrow*, 10 Ves. 589. *Rose v. Cunyngham*, 11 Ves. 550. That a surrender of a copyhold to the use of a will, may be worded so as to operate as a republication of a former will, and make the copyhold pass thereby, see *Heylin v. Heylin*, Cowp. 130. And where a testator by will charged all his estates with payment of debts, and made his son residuary legatee; afterwards purchased copyholds, which were duly surrendered to the use of his will, and by codicil devised those copyholds to his son in fee: the codicil was held to be a republication of the will, so as to subject those copyholds to the payment of debts. *Rowley v. Eyton*, 2 Meriv. 128.]—[Ed.]

(5) Whilst the power of devising depended wholly on the statutes of Henry the Eighth, it was frequently of importance to resort to the custom of devising, as being most beneficial for the devisee. The power by custom might be larger than the statutory power; the former sometimes enabling to devise the whole, where the latter could only be exer-

cised over two parts. 2 Sid. 153. There was also an essential difference between the two powers in the mode of execution; for a will in writing was conceived to be necessary to a devise under the statutes, but a nuncupative will might be sufficient under the custom, 2 Sid. 154. But these differences do not now subsist any longer. As on the one hand the 12 of Cha. 2. by communicating to all freehold lands the qualities of the tenure by common socage, has rendered the power of devising the whole under the statutes of Henry the Eighth universal; so on the other hand the 29 of Cha. 2. against frauds and perjuries, requires the same solemnities of writing, signing, and attestation to a devise by custom, as to one under the statutes. See ante, n. (2), p. 636. and n. (4), p. 637. The two powers of devising being thus assimilated, and made for the most part commensurate, it can seldom happen, that it should be necessary to call the power by custom in aid; though it is possible, as where the custom enables an infant of fourteen, or a feme covert, neither of which is capable of devising under the statutes. As to the infant, see 37 Hen. 6. 5. Perk. sect. 504. 2 And. 12. 5 Co. 84. and as to the feme covert, 5 Com. Dig. 14. where it is said, that by the custom of London she may devise to her husband, but without citing any authority.—[Hargr. n. 4. 111 b. (140).]

vveyed to his wife; for the intention of the act is to give power to dispose of two parts entirely.

Leon. Lo-
vey's case,
and Butler &
Baker's case,
ubi supra.

If the devisor leave a full third part of the land immediately to descend in fee-simple or in tail, he may devise the other two parts in fee-simple. If a third part be not left, it shall be made up according to the act. But hereditaments, that are not of any yearly value, as *bona et catalla felonum et fugitivorum*, waifs, estrays, and the like, can neither be left to descend for any part of the third part, or devised as part of the two parts. But yet if such franchises of uncertain value be holden of the king *in capite*, they shall restrain the devise of all his lands, and make it void for a third part. So it is, if a man hath a reversion expectant upon an estate-tail dry and fruitless holden of the king by knight-service *in capite*, yet that shall distrain him to devise but two parts of his lands only. And where the statute speaks of a remainder, it is to be intended only of such a remainder as may draw ward and marriage by the common law. As if a reversion upon a state for life be granted to one for life, the remainder in fee, during the life of the grantee for life it is not within the statute; but if he dieth, this is such a remainder as is within the statute, although it be dry and fruitless. If a gift in tail or a lease for life be made, the remainder in fee, this remainder in fee is not within the statute. But if a man hath lands holden by knight-service *in capite* in possession, reversion, or remainder, and is also seised of socage land, and devise by his will all his lands, and after he selleth away the *capite* land, or that land is recovered from him, the will is good for the whole socage land. The values both of the third part and the two parts of the lands shall be taken as they happen to be at the time of the death of the devisor; for then his will takes effect

(1 Std. 56.)
Leon. Lo-
vey's case,
ubi supra, fol.
81.

He that holds by knight-service in chief, deviseth by his will a rent, common, or other profits as shall amount to the value of two parts out of all his lands: this rent issueth only out of the two parts, and the third part is free of it. And if he hath lands holden by knight-service, and not *in capite*, he may charge two parts of the knight-service as is aforesaid, and all his socage land, &c. And if he hath only socage land, he may by his will charge it at his pleasure, so as the king's and lord's third part is free, and the heir's two parts charged: and this is only by force of the statute of 34 H. 8.

8 Co. 84, 85.
Sir Richard
Pexhall's
case. 3 Co. 33.
Butler and
Baker's case.
(644)*

6 Co. 17, 18.
In Sir Ed-
ward Clere's
case. (3 Co.
173, Ante. 371.
Cro. Cha. 38.)

If a man make a feoffment in fee of his lands holden by knight-service to the use of such person and persons, and of such estate and estates, &c. as he shall appoint by his will, in this case, by operation of law the use and state vests in the feoffor, and he is seised of a qualified fee. In this case, if the feoffor limit estates by his will, by force and according to his power, there the uses and estates growing out of the feoffment are good for the whole, and the last will is but directory (6). But in that case, if the feoffor had devised the land (as owner thereof) without any reference to the feoffment

(6) Adjudged acc. in *Mytton and Lutwich*, W. Jo. 7.—[Hargr. n. 5. 111 b.]

*112 a.

(Mo. 280.)

(645)*

and power thereby given, then taking effect by the will, it is void for a third part. But if he had formerly conveyed two parts to the use of his wife, &c. and after devised the residue by his will, without any reference to his power by the *feoffment, yet this will enure to declare the use upon the feoffment, because he had no power as owner of the land to devise any part of it (7). But if the feoffment had been made to the use of his last will, although he deviseth the land with reference to the feoffment, yet it taketh effect only by the will, and not by the feoffment (8). All which and *many other points of intricate and abstruse learning you shall more largely read in my Reports.

111 a.

On devise of
lands, the
freehold in
law is in the
devisee be-
fore entry.
(e) 2 H. 6. 16.
27 H. 6. 8. 2
E. 4. 13. 21
E. 4. 21. 4 H.
7. 16.
(f) 4 Mar.
Br. tit. De-
vise, 49.
(g) Regist.
61. 244. 39
Assa. pl. 6. 3
E. 3. Devise*,
12. 29 Ass. 31.
34 E. 3. tit.
Formedon.
Pl. post. 30
H. 8. Devise,
28. F. N. B.
198, 199, &c.
Britton, fol.
212 b. (Post.
240 b. Cro.
Cha. 201.
1 Sid. 191.)

(e) If a man deviseth, either by special name or generally, goods or chattels, real or personal, and dieth, the devisee cannot take them without the assent of the executors (9). But when a man is seised of lands in fee, and deviseth the same in fee, in tail, for life, or for years, the devisee shall enter; for in that case the executors have no meddling therewith. And in the case of a devise by will of lands, whereof the devisor is seised in fee, the freehold or interest in law is in (f) the devisee before he doth enter, and in that case nothing (g) (having regard to the estate or interest devised) descendeth to the heir. But if the heir of the devisor entereth and holdeth the devisee out, he may enter as Littleton (sect. 167) saith, or have his writ called *ex gravi querela*; and this writ (without any particular usage) is incident to the custom to devise; for otherwise, if a descent were cast before the devisee did enter, the devisee should have no remedy. After an actual possession this writ lieth not; for then the devisee may have his ordinary remedy by the common law (A).

(7) This was the point adjudged in Sir Edward Clere's case; and though, as the *whole* of the land is now devisable, the doctrine of that case is no longer of consequence in respect to the extent and exercise of the power of devising, yet it may be material for other purposes; for it comprehends a *general* rule, settling how an act shall operate, where it may take effect in two ways, that is, either as the execution of a power derived from *interest*, or as the execution of a power not arising from *interest*, but *specialty reserved*. In the great case of *Commendams* the doctrine is well explained by Lord Hobart, and finely applied. Hob. 160.—[Hargr. n. 1. 112 a. (141).]

[See ante, p. 591, n. (b).]—[Ed.]

(8) The distinction here made, between a feoffment to the use of a last will, and one to such uses as the feoffor should appoint by last

will, seems extremely subtle. However, Lord Coke reports it as adopted by the judges in Sir Edward Clere's case; and, according to Moore, the same point was adjudged in *Batley and Trevihan*, Mo. 278. But then as to the former of these cases, the opinion on this point must have been extra-judicial, the feoffment having been to such uses as should be appointed by will, and not to the use of the will itself; and as to the latter case, it went off finally on another point. The reasoning in support of the distinction will be found ante, 271 b. and more at large in Mo. 516.—[Hargr. n. 2. 112 a. (142).]

[See ante, 271 b. p. 590.]—[Ed.]

(9) Acc. Perk. sect. 438. 570. and 573. to 576. The other authorities relative to this doctrine will be found in Vin. Abr. *Devise*, A. a. and Com. Dig. *Administration*, C. 5.—[Hargr. n. 6. 111 a.]

(A) As to the writ of *ex gravi querela*, see ante, vol. 1. p. 396. n. (x).

With respect to devises, it may be further remarked, that a devise imports a consideration in itself, and, therefore, cannot be averred to be to the use of any other but the devisee. Hence, a devise of lands cannot be averred at law to be in bar of dower, jointure, or any other right or interest to which the devisee is entitled; though in equity, we have seen, a devise is sometimes considered as a satisfaction. Ante, vol. 1. p. 611. n. 110. 6 Cru. Dig. 9.

* *Testamentum*, is (as is said before) *testatio mentis* (10,) and is favourably to be expounded according to the meaning of the testator. *In contractibus benigna, *in testamentis benignior, in restitutionibus benignissima interpretatio facienda est.* (646)*
 112 a.
 Construction of devises.
 *112 b.

Testamentum, i. e. *testatio mentis*, which is made *nullo præsensis metu periculi, sed solâ cogitatione mortalitatis. Omne testamentum morte consummatum.* 22 b.

AND if a man at divers times makes divers testaments, and divers devises, &c. yet the last devise and will made by him shall stand, and the others are void (11). LITTLETON. [Sect. 168. 112 a.]

"Divers testaments." For *voluntas testatoris est ambulatoria usque ad mortem* (as hath been said before) and the latter will doth countermand the first. And it is truly said, that the first grant and the last will, is of the greatest force. Where there are several wills, or two inconsistent devises, the last only shall stand. 112 b.

"Divers devises, &c." Here by (&c.) is to be understood as well devises of chattels real or personal, as of freehold and inheritance: also that in one will where there be divers devises of one thing, the last devise taketh place. *Cum duo inter se pugnancia reperiuntur in testamento, ultimum ratum est* (12) (B) (C). 2 H. 5. 8. 2 R. 3. 22. (Cro. Eliz. 9. Cro. Jam. 49. 290. 649.)

(10) See the note on this sort of etymology in fol. 110 a. (ante, vol. 1. p. 58. n. 5.)—[Hargr. n. 7. 112 a.]

(11) The words *and the others are void* are not in L. and M. Roh. nor P.

(12) There is a great contrariety in the books, on the effect of two inconsistent devises in the same will. Some hold with Lord Coke, that the second devise revokes the first. Plowd. 541. Others think, that both devises are void on account of the repugnancy. Ow. 84. But the opinion supported by the greatest number of authorities is, that the two devisees shall take in moieties. The authorities for and against Lord Coke's opinion are well collected and arranged in a note in the English edition of Plowden. See page 541.—Also amongst those who think that both devises shall operate, there is some difference as to the manner in which the two

devisees ought to take. In some of the old books it is said generally, that there shall be a joint-tenancy. But according to the modern opinion, and as it seems, the best, there will be a joint-tenancy or a tenancy in common, according to the words used in limiting the two estates; by which we presume it is meant, that if the two estates given by the will have the unity or sameness of interest in point of quantity essential to a joint-tenancy, the devisees shall be joint-tenants, but otherwise shall be tenants in common. See 3 Atk. 493.—[Hargr. n. 1. 112 b. (144).]

[That if a thing be given in one part of a will, to one, and in another part to another, the devisees shall take in moieties, see acc. *Edwards v. Symons*, 6 Taunt. 218. arg. But the general rule is, that of two inconsistent limitations in a will, the latter prevails. See *Wykham v. Wykham*, 18 Ves. 421.]—[Ed.]

Devises are void against creditors; except devises for payment of debts or children's portions, pursuant to a marriage-settlement. Stat. 3 W. & M. c. 14. s. 2, 3 & 4. Ante, vol. 2. p. 237-239. n. (o). Devisees are entitled to aid in equity, for a discovery of the deeds relating to the estate, and to have them delivered up as following the lands. *Duchess of Newcastle v. Pelham*, 3 Bro. P. C. 460. A devise need not be proved in the ecclesiastical court, although it is usually done. Cro. Car. 296. Where it relates to lands in Middlesex or Yorkshire, it may be registered.

With regard to the persons who may devise; it is observable, that all persons seised in fee-simple, and who are capable of disposing of their estates by any conveyance, *inter vivos*, may dispose of them by will. See ante, chap. 32. and the notes there. 6 Cru. Dig. 12-16. As to what persons may be devisees, see ante, vol. 1. p. 188-190. n. (a). 6 Cru. Dig. 16-18. And as to what property may be the subject of a devise, see ante, p. 636, 7. n. (2).—[Ed.]

(B) That a will is not to be construed by something *dehors*, as by the state of the property,

where there is no latent ambiguity, see *Page v. Lepingwell*, 18 Ves. 466. *Fonneress v. Poyntz*, 1 Bro. C. C. 473. *Welby v. Welby*, 2 Ves. & B. 199. *Doe, d. Ozenden v. Chichester*, 4 Dow. 65. *Doe, d. Tyrrell v. Lyford*, 4 Maul. & S. 550: *secus* where the subject of the devise is described by reference to some extrinsic fact; for then extrinsic evidence must be admitted to ascertain the fact, and so to ascertain the subject of the devise. *Sandford v. Chichester*, 1 Meriv. 653. That no averment is allowed to explain wills, see *Plowd.* 345. *Bertie v. Lord Faulkland*, Salk. 231. *Broughton v. Errington*, 7 Bro. P. C. 461. Et vid. 8 Ves. jun. 22. But where there is a latent ambiguity, an averment supported by parol evidence is admissible; as, if a testator having two sons of the name of John, devises generally to his son John, there parol evidence will be admitted to prove which John the testator meant. 5 Co. 68 b. 2 Atk. 372. *Harris v. Bishop of Lincoln*, 2 P. Wms. 135. Et vid. *Careless v. Carel ss.*, 1 Meriv. 384. *Doe, d. Ozenden v. Chichester*, supra. Ante, vol. 1. p. 149. n. (9) and (π), and cases there cited. Where parol averments are allowed to explain a will, they may be encountered by parol averments. *Jones v. Newman*, 1 Bl. Rep. 60. *Thomas v. Thomas*, 6 T. R. 671. *Langham v. Sandford*, 2 Meriv. 6. It is also a general rule, with regard to the construction of wills, "that the testator's meaning is to be collected from the will itself; taking in aid the general rules of construction, established by decision; that the court is not to make a will, but to declare the plain meaning of the words." Per Plumer, V. C. *Noel v. Weston*, 2 Ves. & B. 271. Et vid. *O'Dell v. Crome*, 3 Dow. 61. 68. To authorize the rejection of words in a will, there must be an absolute impossibility of construing the will, those words being retained. The mere improbability that a testator could have meant what he has expressed, neither amounts to a cause for rejection, nor renders the devise void for uncertainty. *Chambers v. Brailsford*, 2 Meriv. 25. And inconvenient consequences, not in the contemplation of the testator, at the time of making his will, are not sufficient to authorize a variation or interpolation in the terms of a bequest; where those terms are in themselves clear and intelligible. *Smith v. Streetfield*, 1 Meriv. 358. Et vid. *Deffiss v. Goldschmidt*, Ib. 419. So on the other side, where a testator has attempted to give to all his grand-children, and also to postpone the period of vesting till twenty-five, which are two objects legally inconsistent; the court cannot choose between these inconsistent objects, so to give effect to the one and disappoint the other. *Leake v. Robinson*, 2 Meriv. 388, 389.

As to what words in a will are sufficient to pass an estate in fee-simple, see ante, vol. 1. p. 498, 9. and the notes there; an estate tail, ante, vol. 1. p. 547, 8. n. (π); an estate for life, ante, vol. 1. p. 18. n. (α), p. 499. n. (P); and estates in joint-tenancy and in common, ante, vol. 1. p. 774, 5. n. (1).

With respect to void devises; it may be observed, that where the testator devises what the law already gives, or in mortmain, or where any fraud has been practised on the testator, the devise is void *ab initio*. As 1st, where the testator devises lands to his heir at law in fee, in which case, we have seen, the heir will take by descent. Ante, vol. 2. p. 185. n. (2). *Plowd.* 545. 2 Saund. 7. n. 1 *Stra.* 487. *Welby v. Welby*, 2 Ves. & B. 190. And that, although the devise is charged with the payment of debts. *Haynworth v. Pretty*, Cro. Eliz. 833. 919. *Clarke v. Smith*, Com. Rep. 72. *Allen v. Heber*, 1 Bl. Rep. 22. But the devisee must be sole heir; for if he is only one of the heirs, he will take under the devise. *Reading v. Royston*, 1 Salk. 242. 2 Ld. Raym. 829. Com. Rep. 123. And a difference in the estate will render the devise good. Ante, vol. 2. p. 185. n. (2). *Plowd.* 545. *Scott v. Scott*, Ambl. 383. Cro. Eliz. 431. *Beare's case*, 1 Leon. 112. But it seems, that a devise to the heir and another, as tenants in common, will not prevent the heir's taking his moiety by grant. Fearn. Op. 128. 6 Cru. Dig. 148. 2d. Devises to charitable uses. Ante, vol. 1. p. 188—190. n. (A). 3d. Where fraud, or circumvention, has been practised on the testator, or where he was incapable of making a will from weakness of mind. But equity will not, on these grounds, set aside a will, but will direct a trial at law on the issue of *devisavit vel non*. *Kerrick v. Bransby*, 7 Bro. P. C. 437. *Webb v. Claverdon*, 2 Atk. 424. And in order to set aside a will for fraud, parol evidence may be given of questions asked by the testator at the time of executing his will. A devise may also become void by an event subsequent to the will; as where the devisee dies before the deviser, the devise becomes void. *Brett v. Rigden*, *Plowd.* 341. *Fuller v. Fuller*, Cro. Eliz. 422. *Hutton v. Simpson*, 2 Vern. 722. *Wynn v. Wynn*, 3 Bro. P. C. 95. *Goodright v. Wright*, 1 P. Wms. 397. 1 *Stra.* 25. 10 Mod. 370. *Warner v. White*, 3 Bro. P. C. 435. And a republication of a will after the death of a devisee in tail, will not give any estate to the issue of the devisee. *Doe v. Kett*, 4 T. R. 601. A devise may also be void for uncertainty; as where it is impossible to discover from the words of the will, to whom the estate is given. *Thomas v. Thomas*, 6 T. R. 671. *Leigh v. Leigh*, 15 Ves. 92. *Barlow v. Bateman*, 3 P. Wms. 65. 4 Bro. P. C. 194. *Pyot v. Pyot*, 1 Ves. 335. *Rox*,

d. *Hayter v. Joinville*, 3 East, 172. *Jones v. Hancock*, 4 Dow. 198, 199, 203. So a devise may be void for remoteness. *Leake v. Robinson*, 12 Meriv. 363. *Proctor v. The Bishop of Bath and Wells*, 2 H. Bl. 358. *Infra*, n. (c).—[Ed.]

(c) Before the close of this chapter, it may be proper to advert to the doctrine of Executory Devises; which seems to have originated in the indulgence shown to testators in effectuating their intentions, whereby the judges were induced in cases of wills, as well as in limitations of uses, to dispense with the strict rules of the common law, according to which no remainder could be limited over after an estate in fee-simple, nor a freehold be created to commence *in futuro*. An executory devise, or bequest, therefore, is such a limitation of a future estate or interest in lands or chattels, as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. *Fearn. Exec. Dev.* 4.

There are three kinds of executory devises; the 1st is, where the devisor disposes of the whole fee, but upon some future contingency qualifies that disposition, and devises the estate over to some other person, 23 Eliz. Dyer, 127 a. *Hoe v. Gerils*, cited Palm. 136. *Pells v. Brown*, Cro. Jac. 590. *Hanbury v. Cockerill*, 1 Rol. Abr. 835. *Heath v. Heath*, 1 Bro. C. C. 147. *Doe v. Weston*, 2 Bos. & P. 324. And though the first estate be not vested, but contingent, yet, if the ulterior devise is limited so as to take effect in defeazance of the estate first devised, on an event subsequent to its becoming vested; it will be deemed an executory devise. *Gulliver v. Wicket*, 1 Wils. 105. But it is a settled rule of law that no no devise is deemed executory, which can be supported as remainder. 2 Bos. & P. 298. *Denny, d. Agar v. Agar*, 12 East. 253. *Crump v. Norwood*, 2 Marsh. 161. *Romilly, knt. v. James*, 6 Taunt. 263. It may be further observed, than an executory devise cannot be barred: *Pells v. Brown*, *supra*. *Mullinix's case*, cited Palm. 136. *Ante*, vol. 1. p. 515, 516. n. (7). And therefore, in order to prevent their being used as a mean of creating perpetuities, it was established, that an executory devise must vest within the compass of a life, or lives in being, and twenty-one years and nine months after. *Pells v. Brown*, *supra*. *Fairfax v. Heron*, *Prec. in Ch.* 67. *Taylor, d. Smith v. Biddall*, 2 Mod. 289. *Stephens v. Stephens*, *Forr.* 228. *Leake v. Robinson*, 2 Meriv. 363. For the principle on which these limits have been fixed, see Mr. Hargrave's second argument in the *Thelluson* causes, p. 57. *ante*, vol. 1. p. 515—516. n. (7). A devise after a general failure of heirs or issue, is too remote, 6 Cru. Dig. 449; and we have seen, that the words "dying without issue," or "without leaving any issue," are construed, as to the freehold, to mean a dying without issue *generally*, by which there may be at any time a failure of issue, *ante*, vol. 1. p. 548. n. (N); though as to the personal estate it is different, for there the same words shall be construed to mean a dying without leaving issue at his death; the reason of which difference in the case of personalty is, in order to support the devise over, which otherwise would be too remote. *Forth v. Chapman*, 1 P. Wms. 663. *Atkinson v. Hutchinson*, 3 P. Wms. 261. *Southby v. Stonehouse*, 2 Ves. 615. *Earl of Stafford v. Buckley*, *Ibid.* 180. *Exel v. Wallace*, *Ibid.* 120. *Read v. Snell*, 2 Atk. 616. *Sheffield v. Lord Orrery*, 3 Atk. 288. *Dansey v. Griffiths*, 4 Maul. & S. 61. *Crooke v. De Vandes*, 9 Ves. 197, 203. The reason wherefore, in the case of a devise of lands of inheritance to one, or to one and his heirs, and if he die without issue, then to another, the subsequent words, "if he die without issue," shall either reduce or enlarge his estate to an estate-tail, is, because they are supposed to be inserted in favour of the issue, that they shall have it; and the intent shall take place. S. C. 4 Maul. & S. 62. In the case of a devise in fee, with an executory devise over, curtesy attaches on the first estate, and is not defeated by its determination. *Buckworth v. Thirkell*, 1 Collec. Jur. 332. *Ante*, vol. 1. p. 561. n. (c).

The 2d sort of executory devises, is that of a devise of a freehold estate to commence *in futuro*; as where the devisor, without departing with the immediate fee, gives a future estate, to arise either upon a contingency, or at a period certain, unprecedented by, or not having the requisite connexion with, any immediate freehold; to give it effect as a remainder. *Fearn. Ex. Dev.* 4th ed. 17, 24. *Pay's case*, Cro. Eliz. 878. *Clarke v. Smith*, 1 Lutw. 798. 1 Freem. 244. 1 Wils. 206. Devises of this sort are sometimes supported as remainders. See *Purefoy v. Rogers*, 2 Saund. 380. *Doe, d. Mussell v. Morgan*, 3 T. R. 763. And wherever the first devise can be construed to pass an estate-tail only, the devise over will be deemed a remainder expectant on the determination of that estate-tail, and not an executory devise. *Spalding v. Spalding*, Cro. Car. 185. *Wealthy v. Bosville*, Rep. Temp. Hardw. 258. *Doe, d. Mussell v. Morgan*, *supra*. *Ante*, vol. 1. p. 547, 8. n. (w). Executory devises of this sort must vest within the same time, as was mentioned to be prescribed for those of the first kind. But it should be observed, that "by the time of vesting," is meant, the vesting of the freehold. For although land should be limited for a long term of years, with remainder to the unborn son of a person then living, this executory

devise to such unborn son would be good; because the vesting of the freehold is confined to the period of a life in being: for upon the birth of such son, the freehold will vest in him; or, upon the death of such person without any son, it must vest somewhere else, subject only in either case to the preceding term. *Gore v. Gore*, 2 P. Wms. 28. When an estate is devised to a person upon an event, which is too remote; a devise over, depending on the same event, is also void. *Proctor v. Bishop of Bath*, 2 Hen. Bl. 358. *Earl of Chatham v. Tothill*, 6 Bro. P. C. 451. 1 Ves. 134. So a devise after failure of the issue or heirs of A., where no estate-tail is already vested or given by the express words of the will, or arises by implication, to such issue or heirs, is void in its creation: for if A. should have heirs or issue, they might last for ever; and, while they did, there would be nobody who could bar the estate thus devised, so that a perpetuity would be created. Dougl. 506. n. *Wright v. Hammond*, 8 Vin. Ab. 110. 1 Stra. 427. *Lanesborough v. Fox*, 3 Bro. P. C. 130. *Goodman v. Goodright*, 1 Bl. Rep. 188. Dougl. 507. But though in general a devise after a general failure of heirs or issue, is void, yet this rule admits of some exceptions: As, 1st. where a person who is entitled to a reversion expectant on the determination of an estate-tail, devises the lands to another, after failure of issue of the tenant in tail; this is held to be an immediate devise of the reversion, and therefore good. *Badger v. Lloyd*, 1 Ld. Raym. 523. 1 Salk. 232. Fearn. Ex. Dev. 326. *Jones v. Morgan*, 3 Bro. P. C. 322. *Lytton v. Lytton*, 4 Bro. C. C. 441. 2d. A devise in default of issue of the devisor: which has been construed to be a conditional devise, to take effect at the death of the testator, and has therefore been held not to be executory. *Willington v. Willington*, 1 Bl. Rep. 645. *French v. Cadell*, 3 Bro. P. C. 257. 3d. A devise over for life, to a person *in esse*, to take place on failure of issue of the first devisee, may be good; because, the future limitation being only for the life of a person *in esse*, it must necessarily take place during that life, or not at all: and therefore the failure of issue, in that case, is confined to the compass of a life in being. Fearn. Ex. Dev. 279. *Doe v. Lyde*, 1 T. R. 593. 4th. Where an estate-tail is raised by implication, in the person, on the failure of whose heirs or issue the statute is devised over: in which case the second devise is supported as a remainder, expectant on the determination of such prior estate-tail. *Walter v. Drew*, Com. Rep. 372. *Jones v. Morgan*, supra. Ante, vol. 1. p. 547, 8. n. (x).

3d. With respect to executory devises of terms for years:—A bequest over of a term for years, after a previous disposition for life, was formerly void; because, an estate for life being of greater estimation in the eye of the law than the longest term for years, it was concluded, that the limitation of a term for years, to a person for life, was a complete disposition of it; and it was also considered that the possibility of a term's continuing longer than the life of the person, to whom it was first bequeathed, was not such an interest as by the rules of law could be limited over. 1 Burr. 284. But such bequest is now good. 6 Cru. Dig. 476, 477. *Matthew Manning's case*, 8 Co. 95. *Lampet's case*, 10 Co. 46. And in like manner a similar declaration of a trust of a term, is good. 1 Burr. 284. 1 Vern. 235. And though to a person not *in esse*, or not ascertained. *Cotton v. Heath*, 1 Rol. Abr. 612. 1 Ab. Eq. 191. Although a devise of a term for years to a person and the heirs of his body, vests the entire and absolute property of the term in him, if not restrained by subsequent words; yet, if a devise over of it is made, which is within the rules established for preventing perpetuities, it will be supported as an executory devise. And the devisee for life cannot bar the devise over; nor will any subsequent union of the freehold or inheritance, with the interest so given to the first devisee, or a feoffment, or other act of forfeiture, by such first devisee, extinguish or affect the interest of the ulterior devisee. Fearn. Ex. Dev. 55. *Hamington v. Rudyard*, cited 10 Rep. 52 a. *Cotton v. Heath*, supra. But an executory bequest of a term for years, as well as executory devises of estates of inheritance, must vest within the compass of a life or lives in being, and twenty-one years and some months after. Therefore where a term for years is given over, after a general and indefinite failure of issue, it is void, as being too remote. *Burford v. Lee*, 2 Freem. 210. *Love v. Windham*, 1 Mod. 50. And such limitations cannot be supported as remainders. 6 Cru. Dig. 481. But where there are words to restrain the failure of issue to a life or lives in being, and twenty-one years and some months after, it is good. *Duke of Norfolk's case*, 3 Ch. Ca. 1. Pollexf. 223. *Lamb v. Archer*, 1 Salk. 225. *Fletcher's case*, 1 Ab. Eq. 193. *Long v. Blackall*, 7 T. R. 100. And the court of chancery has very much inclined to lay hold of any words in a will, to restrain the generality of the words "dying without issue," and confine them to dying without issue living at the time of the person's decease, in order to support the intention of the testator: by which construction the devise over becomes valid, being confined to the period of a life in being. *Target v. Gaunt*, 1 P. Wms. 432. *Forth v. Chapman*, 1 P. Wms. 663. *Atkinson v. Hutchinson*, 3 P. Wms. 258. *Goodtitle v. Pegden*, 2 T. R. 720. *Wilkinson v. South*, 7 T. R. 555. But, in devises of terms,

there is no distinction between words giving an express estate-tail, or by implication, *Fearn. Ex. Dev.* 233. 1 P. Wms. 433. 3 P. Wms. 268; nor between a devise to one for life expressly, and if he die without issue, remainder over; or to one indefinitely, and if he die without issue, remainder over. *Love v. Windham*, supra. *Clare v. Clare*, *Forrest*, 21. *Fearn. Ex. Dev.* 275. An executory devise of a term for life to a person *in esse*, to take place upon a dying without issue of another, is good; because, the future limitation being only for the life of a person *in esse*, it must necessarily take place during that life or not at all: and therefore the failure of issue is, in that case, confined to the compass of a life in being. *Oakes v. Chalfont*, *Pollexf.* 38. *Et vid.* 3 *Atk.* 449. *Doe v. Lyde*, 1 T. R. 593.

With regard to executory devises in general, it may be further observed, that, where one limitation of a devise is executory, all the subsequent ones are so likewise. *Fearn. Ex. Dev.* 334. *Carth.* 310. *Gore v. Gore*, 2 P. Wms. 28. A preceding executory limitation may, however, be uncertain and contingent; when a subsequent one, though to take effect in future, may not be uncertain or conditional (otherwise than in respect of the possibility of its expiration before the former vests or fails); but may be so limited as to take effect either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. In either of those cases it must vest at the time appointed for the preceding limitation to vest: for, should the preceding limitation fail of taking effect, the subsequent one will then vest in possession. Should the preceding take effect, the subsequent one will at the same time vest in interest as a remainder upon the preceding one, and then become liable to the same modes of destruction, to which other remainders of the same kind are subject. *Brownsword v. Edwards*, 2 Ves. 243. *Southby v. Stonehouse*, 2 Ves. 610. A distinction must, however, be made between cases of this nature, and the case where a testator devised to B. his son and heir; and if he died before twenty-one, and without issue of his body then living, the remainder over, &c. B. survived the twenty-one years, and then sold the lands and died; and it was held, that he had a fee-simple immediately: for the estate-tail was limited to arise upon a contingency subsequent. *Collinson v. Wright*, 1 Sid. 148. And also, where a person devised lands to his wife till his son came of age; and then that his son should have the land to him and his heirs; and if he died without issue before his said age, then to his daughter and her heirs; this was held to be a good executory devise to the daughter, if the contingency happened; and if he lived to twenty-one, though he after died without issue, or left issue though he died before twenty-one; yet the daughter was not to have the land, because he was to die without issue and before twenty-one, or else the daughter could not take. *Et vid. acc.* *Eastman v. Baker*, 1 Taunt. 174. It is observable, that, in the two cases which have been last stated, the devise to the son was in fee, so as not to admit a regular remainder after it: whereas in that of *Brownsword v. Edwards*, the first devise was in tail, upon which Lord Harkwicke laid so much stress as to say, that had the devise been to B. and his heirs, the construction he gave could not, he believed, be made; for where there was such a contingent limitation, he did not know that the court had changed the word "heirs" into "heirs of the body," to make it so throughout. *Fearn. Ex. Dev.* 6th ed. 389—392. With respect to this class of cases, it may be remarked, that a devise to the heir at law in fee, with an executory devise over in case he does not attain twenty-one years of age, does not alter the quality of the estate, which he would otherwise have taken as heir; but he takes by descent, and not by purchase: and the defeasibility of the estate, upon the happening of the event which was contemplated by the will, makes no difference. *Doe, d. Pratt v. Timons*, 1 Barn. & A. 350. *Et vid.* *Chaplin v. Leroux*, 56 Geo. 3. cited *ibid.* 541. *Buckworth v. Thirkell*, 3 Bos. & P. 652. n.

That a preceding executory limitation is not a condition precedent, see ante, p. 87. n. (12). *Jones v. Westcombe*, 1 Ab. Eq. 245. *Andrews v. Fulham*, cited 1 Ves. 421. *Roe v. Weskett*, cited 1 Ves. 421. 1 Wils. 107. 3 Burr. 1624. *Gulliver v. Wickett*, 1 Wils. 105. *Avelyn v. Ward*, 1 Ves. 420. That limitations over, after an executory devise of the whole interest, may be good as alternatives, if no one of the preceding executory limitations happens to vest; but when once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then vested, see *Massenburgh v. Ash*, 1 Vern. 234. 304. *Higgins v. Dowler*, 1 P. Wms. 98. *Salk.* 156. *Stanly v. Leigh*, 2 P. Wms. 686. *Stephens v. Stephens*, *Forr.* 228. See further as to the distinction between the cases where a subsequent limitation may become good, and where not, *Fearn. Ex. Dev.* 491. *Sabbarton v. Sabbarton*, *Forr.* 245. That a limitation, which was originally a contingent remainder, may take effect as an executory devise; as where the freehold, upon which the contingent limitation depends, becomes, by the death of the first devisee in the testator's life-time, incapable of taking effect: in which case, the subsequent limitation, if the contingency has not then happened,

shall enure as an executory devise, rather than fail for want of that preceding freehold which had never taken effect, see *Fearn. Ex. Dev.* 492. *Hopkins v. Hopkins*, Forr. 44. 1 Ves. 269. 1 Atk. 581. *Stephens v. Stephens*, supra. But when a preceding freehold has once vested, no subsequent accident will make a contingent remainder enure as an executory devise: it being a rule that, wherever a devise may be construed a contingent remainder, it shall never be considered as an executory devise. *Fearn. Ex. Dev.* 498. As to the distinction between executory devises *per verba de præsenti*, and *per verba de futuro*, see *Fearn. Ex. Dev.* 503-510. That where there is an executory devise, and the freehold is not in the meantime disposed of, the freehold and inheritance descend to the testator's heir at law, see *Pay's case*, Cro. Eliz. 878; and also the intermediate profits, *Hopkins v. Hopkins*, supra. *Bullock v. Stones*, 2 Ves. 521. But a devise of the residue will pass such profits. *Stephens v. Stephens*, supra. *Rogers v. Gibson*, 1 Ves. 485. That executory interests in lands of freehold, as well as executory interests in terms for years, are devisable, see ante, p. 636-7. n. (2). *Veizy v. Pimwell*, Pollexf. 44. *Wind v. Jekyll*, 1 P. Wms. 572; that the latter are assignable, *Thimpland v. Courtney*, 2 Freem. 250. *Theobalds v. Duffey*, 2 P. Wms. 608. *Wright v. Wright*, 1 Ves. 409; and the former may be passed at law by fine by way of estoppel, 6 Cru. Dig. 552; and that both are descendible and transmissible to the heirs and executors of the devisee, see *Gurnell v. Wood*, 8 Vin. Abr. 112. *Willea*, 211. *Goodright v. Searle*, 2 Wils. 29. That in cases of contingent or executory interests, the court of chancery will interfere in behalf of the persons entitled to such interests, to prevent unreasonable waste being committed by the tenants in possession, see *Garth v. Cotton*, 3 Atk. 757. Post, vol. 3. p. 246. n. (q). *Stansfield v. Habbergham*, 10 Ves. 278.

With respect to trusts of accumulation, the stat. 39 & 40 Geo. 3. c. 98. enacts, that no person, by deed or will, &c. shall settle or dispose of any real or personal property, in such manner that the rents or produce shall be accumulated for a longer term than the life of the settler; or twenty-one years after his decease; or during the minority of any party living at his decease; or the minorities of persons beneficially entitled: and any other direction shall be void, and the rents, &c. go to the persons entitled thereto, s. 1. But nothing in this act is to extend to any provision for payment of debts, or for raising portions for children, or touching the produce of timber, s. 2: nor to any disposition of heritable property in Scotland, s. 3. The restrictions of this act are to take effect with respect to wills made before the passing of the act, only where the testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of the act, s. 4. Although a trust of accumulation created by will during the continuance of a life, is void under this statute, yet such trust will be supported in equity during the time allowed by the act, namely, twenty-one years. *Griffith v. Vere*, 9 Ves. 127. *Longdon v. Simson*, 12 Ves. 295. *Leake v. Robinson*, 2 Meriv. 389. On the construction of this statute, see Mr. Preston's observations, in *Fearn. Cont. Rem.* 6th edit. 538-542.—[Ed.]

APPENDIX.

CONTAINING MR. BUTLER'S NOTES.

NOTE I.

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The doctrine of conditions is derived to us from the feudal law. The rents and services of the feudatory are mentioned by feudal writers, as conditions annexed to his fief. If he neglected to pay his rent, or perform his service, the lord might resume the fief. But the payment of rent and the performance of feudal service were, for a long period of time, the only conditions that could be annexed to a fief; and, the latter, whether expressed or not, was always presumed by the law;—being incident to, and inseparable from, the estate of the feudatory. In this sense they are called conditions in law, or implied conditions. Afterwards, when other conditions were introduced, the estates to which they were annexed were ranked among improper fiefs.—See Sir Thomas Craig, *De Jure Feudali*, lib. 2. *diæg.* 4. *sect.* 1, 2, 3. Conditions of this last sort were called express, or conventional conditions. By an application, in some respects very much forced, of the original principle of conditions, that on the non-performance of them, the lord might resume his fief, conditional fees at common law, and some other modifications of landed property, were introduced as estates upon condition. These are often of such a nature, as to make it more natural that a stranger should have the estate on the non-performance of the condition, than the donor:—and, that the lord, instead of being confined to his right of resumption, should have it in his power to compel the performance of the condition, or recover from the donee a compensation, or satisfaction, for the breach of it. But, as all these estates were introduced as estates upon conditions, the law, where it still considers them as conditions, and except where it has been altered by act of parliament, confines the donor's remedy to the resumption of the estate, and gives that remedy only to the donor and his heirs.—Considered in this sense, the word Condition has, in our law, a much more contracted meaning than it has in the civil law; where it signifies, generally, all those pactions, or agreements, which regulate that which the contractors have a mind should be done, if a case, which they foresee, should come to pass. This is the definition of Domat, *lib.* 1. *tit.* 1. *sect.* 4.—[Butler, note 84.]

NOTE II.

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Acc. 1 Roll. Abr. 410. L. 30. though it stands indifferent whether it be the speaking of the grantor or grantee; for in that case it shall be referred to the grantor, as no condition can be reserved or made, but on the part of the donor, lessor, or feoffor. Dyer, 6. And it is immaterial in what part of the deed the word proviso stands, and though there be covenants before or after. 2 Rep. 70, 71. 1 Roll. Abr. 407. Dyer, 311. But when it does not introduce a new clause, and only serves to qualify or restrain the generality of a former clause, it is not a condition. Moore, 307. 707.

We should carefully distinguish between, I. *A condition*, II. *A remainder*, III. *And a conditional limitation*. IV. It may also be proper to notice, in this place, *the effect of a condition, defeating the estate of a tenant to the repleve in a recovery*.

I. We have seen that a condition defeats the whole estate; that none but the donor or the heir can take advantage of, or enter for, the breach of it; and that, when he enters, he is in

as of his old estate. Such is the case put by Littleton of a feoffment in fee, reserving a yearly rent, with a condition that, if the rent be behind, it shall be lawful for the feoffor and his heirs to enter.

II. *A remainder* is defined by Lord Coke, ant. 143. to be "a remnant of an estate in lands or tenements, expectant on a particular estate, created together with the same, at the same time;" so that it waits for, and only takes effect in possession, on the natural expiration or determination of the first estate; as, if a man limits an estate to *A.* for life, and after his decease to *B.* in fee, this is a remainder: it does not defeat, but it expects the natural end and expiration of the first estate limited to *A.* for his life; and, when that event happens, not the heir, but a stranger has the advantage of it.

III. *A conditional limitation* partakes of the nature both of a condition and a remainder. It is to be observed, that at the common law, whenever either the whole fee, or a particular estate, as an estate for life, or in tail, was first limited, no condition or other quality could be annexed to this prior estate which would have the double effect of defeating the estate, and passing the land to a stranger: for, as a remainder, it was void, being an abridgment or defeasance of the estate first limited; and, as a condition, it was void, as no one but the donor or the heirs could take advantage of a condition broken, and the entry of the donor or his heirs unavoidably defeated the livery, upon which the remainder depended. On these principles it was impossible, by the old law, to limit by deed, if not by will, an estate to a stranger, upon any event which went to abridge or determine an estate previously limited. But the expediency and utility of such limitations, assisted by the revolution effected in our law by the statute of Uses, at length forced them into use, in spite of the maxim of law, that a stranger cannot take advantage of a condition. These limitations are now become frequent, and their mixed nature has given them the appellation of conditional limitations: they so far partake of the nature of conditions, as they abridge or defeat the estates previously limited; and they are so far limitations, as, upon the contingency taking place, the estate passes to a stranger. Such is the limitation to *A.* for life, in tail, or in fee, provided, that when *C.* returns from Rome, it shall from thenceforth remain to the use of *B.* in fee. See Mr. Fearn's Essay on Contingent Remainders, 6th ed. p. 9. Of late, however, it has been frequently argued, that the difference between a remainder, and what is generally understood by a conditional limitation, is merely verbal. See 10 Mod. Rep. 423. Mr. Douglas's note to page 727, of his Reports, and Mr. Fearn's reply in the last edition of his Essay, 6th ed. p. 15.

IV. In addition to what has been mentioned in the concluding note on 202 b. respecting the principle, that, when a feoffor enters for a condition broken he is in as of his former estate,—it may be observed, that, when a tenant for life joins with a remainder-man in suffering a common recovery, it is sometimes practised, as a precaution against letting in the incumbrances of the remainder-man, to annex a condition to the estate of the bargainee or releasee, who is made tenant to the præcipe, on the non-performance of which his estate is to become void. For, if *A.* be tenant for life, with remainder in tail to *B.* and *B.* executes leases, confesses judgments, or otherwise incumbers his estates; and afterwards *A.* and *B.* join in suffering a common recovery, all the incumbrances of *B.* are immediately let in upon the fee gained by the recovery; and that fee, and every estate derived out of it are subject to them. To avoid which, *A.* the tenant for life, by lease and release, or by bargain and sale enrolled, conveys the estate to the intended tenant to the præcipe, to hold to him and his assigns during the joint lives of him and the grantor or bargainor; with a declaration, that such grant and release, or bargain and sale is made, to enable the grantee or bargainee to be tenant of the freehold in the proposed recovery; and a declaration of the uses, to which it is intended that the recovery shall enure. Then a proviso is inserted, that, if the bargainee or releasee do not, within six months, pay the tenant for life 100,000*l.* or some other very large sum of money, the bargain and sale, or grant and release, shall be void; and that it shall be lawful for the bargainor or grantor to enter, as in his former estate. The money is not paid at the day appointed; and thereupon the bargain and sale, or grant and release, is void, and the bargainor or grantor becomes seized of his ancient life estate. But, though the bargain and sale becomes void, yet, as at the time of suing the original writ and the præcipe, the bargainee or releasee was tenant of the freehold, the subsequent cesser or determination of his estate does not impeach the recovery. For, if the person against whom the præcipe is brought, be, at the time when the præcipe is sued, or at any time before judgment, actual tenant of the freehold, it is immaterial what becomes of it afterwards. This doctrine has been carried so far, that where a tenant to the freehold was made by a fine, and the fine has been reversed, yet the recovery was held good. (See *Lloyd v. Evelyn*, 1 Salk. 568; and see 1 Shower's Rep. 347. Hob. 262. Noy, 196. 1 Mod. 218.) The recovery therefore, in this case, is good; the freehold upon which it was suffered is determined; and the bargainor

or grantor comes in of his original estate, and of course avoids all the leases, judgments, and other incumbrances of the tenant in tail. The reason why the conveyance is made to the bargainee or releasee during the joint lives of him and the grantor or bargainor, is, to preserve, *as far as the case admits*, his powers, by leaving the reversion in him.—For supposing *A.* to be tenant for life with the usual powers of leasing, jointuring, and charging; remainder to trustees to preserve contingent remainders; remainder to *A.*'s first and other sons in tail male; remainder to his daughters as tenants in common in tail, with cross remainders in tail between them, if more than one, with remainders over; *A.* and his daughters may suffer a common recovery; and it will be good against *A.* and his daughters, and their issues in tail, and the remainders over. But the estates tail of the sons, being prior to the estates of the daughters, and being supported by the estate of the trustees for preserving contingent remainders, are not, whether vested or contingent, at the time of the recovery affected by it.—But if *A.* granted his whole life estate to the tenant to the præcipe, it *might* be apprehended, that the powers relating to his estate, whether appendant or in gross, would be extinguished thereby, (See *Edwards v. Slater*, Hardres, 410, and *King v. Melling*, 1 Vent. 225.) and a limitation or grant of new powers would be void against the sons and the heirs male of their bodies. To prevent this question being made, *A.* the tenant for life, conveys an estate to the intended tenant to the præcipe, only during the joint lives of the tenant and grantor or bargainor. This continues the old reversion in the grantor or bargainor, and preserves the powers relating to his original estate, to which he is restored on the breach of the condition. It is customary in these cases to declare, that the recovery shall enure in the first place, for corroborating, strengthening, and confirming the estate for life of the grantor or bargainor, and all other estates precedent to the estate in tail meant to be destroyed, and all powers and privileges annexed to such estate for life, and other precedent estates.—The mode of suffering recoveries on a conditional estate of freehold was in use so early as the end of the last century.—[*Butler*, note 94.]

NOTE III.

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The necessity which there was in the old law, that there should always be some person to do the feudal duties, to fill the possession, and to answer the actions which might be brought for the fief, introduced the maxim, that the freehold could never be in abeyance. See 2 *Wilson*, *Bund v. West*, 165. But it was admitted, that there were some cases in which the inheritance, when separated from the freehold, might be so. The question agitated in the Commentary upon this and the following Section, arises from the difficulty of ascertaining where the freehold, in the case mentioned by Littleton, is to be. By the livery it is taken out of the grantor; it must therefore vest in the feoffee. Yet it seems difficult to conceive how it could be in the grantee, consistently with the term of years. The opinion adopted by Littleton and Sir Edward Coke is conformable to what is said in Lord Stafford's case, 8 Rep. 73 b.—It is to be observed, that though by conveyance at common law the freehold necessarily passes out of the grantor; and that if there is not some person in being in whom it can immediately vest, the conveyance is void; that is not the case with respect to wills, conveyances under the statute of Uses, trusts in equity, or grants of rents *de novo*. For, as to wills, there is no immediate transfer of the freehold, as, upon the death of the testator, it vests in the heir to answer the lord's services and the stranger's writs. As to conveyances under the statute of Uses;—till there is some person in being in whom the use can vest, the possession is not altered, but continues in the feoffor and his heirs. See 1 Inst. 23. As to trusts, the legal estate, upon which the trust is charged immediately vests and continues in the trustee: and as to rents *de novo*, the tenant continues in possession of the land out of which they issue. However it is to be observed, that in cases of wills, uses, and trusts, if it be inconsistent with the estates *expressly* declared, that the freehold should remain with the party (as if he has a term of years *expressly* given him, the law will not give him, by *implication*, an estate of freehold, if, consistently with the rules of law, it can be considered to reside elsewhere. See *Pybus v. Mitford*, 1 Vent. 372. *Adams v. Savage*, 2 Salk. 679. *Penhay v. Hurrell*, 2 Vern. 370. *Davies v. Speed*, 2 Salk. 675. In the same manner, if a person limits his estate to such uses as he shall appoint; and in the mean time, and until he makes an appointment, to the use of himself and his heirs; or if he limits it to the use of himself for life, and after his decease, to such uses as he shall appoint, and for want of appointment, to the use of his right heirs;—in both of these cases the fee simple continues to reside in the settler, subject to be divested from him by an exercise of

his power of appointment. If the settler makes an appointment, a new use springs up and vests in the appointee; the fee originally limited to the settler ceases; and, from that time, speaking generally, the use appointed under the power takes effect, in the same manner as if it had been inserted in the original deed, in the place of the power. But, if no appointment is made, the fee, from being determinable, becomes simple and absolute. It may be objected, that in the second of these cases, an estate for life is expressly limited to the settler, and that the fee is therefore put in abeyance. But, in the case of *Leonard Lovie*, 10 Rep. 78, where the estate was devised to Leonard Lovie expressly for his life, without impeachment of waste, and afterwards to such uses as he should appoint, and after several intermediate remainders to the use of his right heirs, it was resolved, that the fee vested in him till the appointment be made. See also *Sir Edward Clere's case*, 6 Rep. 17. The doctrine which is the subject of this note has received a full investigation in the late case of *Maundrell v. Maundrell*, 7 Ves. jun. 567. and 10 Ves. jun. 246. and is very ably discussed by Mr. Sugden, in his *Practical Treatise of Powers*, page (266. 1st ed.) 332. 2d ed. — [*Butler*, note 119.]

NOTE IV.

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The doctrine of law expressed in the text is generally called **THE RULE IN SHELLEY'S CASE**;—and has been discussed by several gentlemen of the greatest eminence in the profession.

1. In *Sir William Blackstone's argument in the case of Perrin v. Blake*, published by Mr. Hargrave among his law tracts, fol. 500, it is observed, that, "where there is a gift to *A.* and his heirs for ever, or to *A.* and the heirs of his body begotten, the first words (to *A.*) create an estate for life; the latter (to his heirs, or the heirs of his body) create a remainder in fee, or in tail, which the law, to prevent an abeyance, refers to and vests in the ancestor himself, who is thus tenant for life, with an immediate remainder in fee or in tail; and then by the conjunction of the two estates, or the merger of the less in the greater, he becomes tenant in fee, or tenant in tail in possession." This exposition of the expression in question Sir William Blackstone afterwards applies, with great ability, in his investigation of the rule in *Shelley's case*. He lays it down as a great fundamental maxim upon which the construction of every devise must depend, that the intention of the testator shall be fully and punctually observed, so far as the same is consistent with the established rules of law and no farther. He makes a distinction between those rules of law which are to be considered as the fundamental rules of the property of this kingdom, and are therefore of that essential, permanent and substantial kind, which cannot be exceeded or transgressed by any intention of a testator, however clearly or manifestly expressed; and those rules of a more arbitrary, technical, and artificial kind, which the intention of a testator may control. He then supposes that there is a third class of rules, of a still more flexible nature. Among the rules of the first class he reckons these; that every tenant in fee simple, or fee tail, shall have the power of alienating his estates, by the several modes adapted to their respective interests; that no disposition shall be allowed which in its consequence tends to a perpetuity; that lands shall descend to the eldest son or brother alone, or to all the daughters or sisters in partnership. Among the rules of the second class he reckons those rules of interpretation by which the courts invariably construe particular modes of expression to denote a particular intention in the testator. Thus, says he, if a man devises his land, being freehold, to another generally, without specifying the duration of his estate, the courts consider it as evidence that he intended the devisee should be only tenant for life; but if he devises, in like manner, a chattel interest, the courts consider it to be evidence of his intention that the devisee should have the total property. Among the rules of the third class he reckons the rule in *Shelley's case*. Having admitted that the second and third class of rules allow of exceptions, when it appears to be the testator's intention that the operation of his devise should be different from that which the legal operation of the words in which it is penned would be, he adds, that this intention shall not have this effect, unless it is manifest and certain: so that if his intention that his words should operate contrary to their technical and legal import, does not appear by express words or by necessary implication, the legal operation of the words must take effect. He applies this rule to the case of *Perrin v. Blake*. He argues that it does not appear by any evidence that the testator intended his words should not have their legal operation: he says, the question is not whether the testator intended the ancestor should or should not have a power of alien-

ting the lands devised to him, or should have only an estate for his life. He admits it to be clear, that he intended the ancestor should not have a power of alienating the lands, and that he should take only an estate for his life: but the real question, he says, is, how the heirs were intended to take, whether as descendants or purchasers. If the testator intended they should take as purchasers, the ancestor remained tenant for life; if he meant they should take by descent, or had formed no intention about the matter, then, says he, by operation and consequence of law the inheritance is vested in the ancestor. He says, that in the case of Perrin and Blake, it is neither clearly expressed nor manifestly to be implied from any part of the testator's will, that he intended the heirs should take as purchasers; he therefore concludes, that the words in question should be construed according to their legal operation: and consequently, that in conformity to the rule laid down in Shelley's case they should operate not as words of purchase, but as words of descent, and that the ancestor therefore should take an estate in tail.

II. *Mr. Hargrave*, in his observations concerning the rule in Shelley's case, remarks, that those who wish to avoid the rule, avow that they consider it as subordinate to the intention of the testator, as a rule of interpretation, as merely a technical construction of words, which yields to the intention whenever they are opposed to each other; that as soon as they discover that it is not the testator's intention that the first taker should have a power of barring the entail to his heirs, they think the victory over the rule is complete. On the other hand, those who wish to support the rule insist that it is a rule of interpretation, established on decrees of the most authoritative decisions, which cannot be departed from without levelling the great landmarks, by which the titles to real property are ascertained, and establishing in their room a monstrous latitude of uncertain and arbitrary construction. He says, he finds something to approve and something to condemn on both sides of these discordant comments upon the rule; and that in both there is one common error. To the opponents of the rule he admits, that where the rule would disappoint a lawful intention sufficiently expressed, it ought not to be effected. But he asks, whether the intention is lawful. The rule, as he considers it, is a conclusion of law upon certain principles—so absolute, as not to have any thing to say to the intention, if these premises really belong to the case; and these premises, he insists, are an intention by heirs of the body, or other words of inheritance, to comprehend the whole line of heirs to the tenant for life, and so to build a succession upon his preceding estate of freehold. This being so, if in such cases the word *heirs* is used in that its large and proper sense, it is a contradiction to the rule, to intend that the remainder to the heirs shall operate by purchase, and such intent is not lawful; so that it is incumbent on those who oppose this application of the rule, to show, that the word *heirs* is used in a qualified sense, and intended merely to describe certain persons, who, at the death of the tenant for life, may answer that description, and to give a succession of heirs to them: this being shown, the rule, he says, no longer applies. But nothing less than its appearing, that by the heirs of the body or heirs general, the whole line and succession of heirs to the tenant for life, or, in other words, the whole of his inheritable blood, was not meant, can deliver the case from the rule. He says, that the genuine rule in Shelley's case is part of an ancient policy of the law to guard against the creation of estates of inheritance, with qualities, incidents, or restrictions, foreign to their nature. Thus it is one of the properties of an estate in fee simple, that it may be alienated by the party seized, so that a condition not to alien is void at law. Thus curtesy and dower are incidents to estates of inheritance, and inseparably annexed to them; that these known examples of incidents, inseparable from inheritance, lead to a discovery of a foundation for the rule, which in a moment renders it paramount to and independent of private intention. It is one branch of a policy of law, adopted to prevent annexing to a real descent the qualities and properties of a purchase, and so is calculated to render impossible the creation of an amphibious species of inheritance: that is, an estate of freehold, with a perpetual succession to heirs, without the other properties of inheritance; in other words, an inheritance, in the first ancestor, with the privilege of vesting in the heirs by purchase the succession of one to another, without the legal effects of a descent, a compound of descent, and purchase.—Such a commixture would, he says, have put an end to all those lines of distinction by which we so easily and certainly discriminate inheritances from mere estates of freehold. It would have been a continual source of fraud upon feudal tenure. When the heir came into the tenure by descent, the lord was entitled to those grand fruits of military tenure, wardship, and marriage; but if he took by purchase, only the trifling acknowledgment of relief was due to the lord. If the heir were allowed to succeed by purchase, it would defeat the specialty creditors of the ancestor; it would have suspended all actions for the inheritance of land. If private intention had been permitted to annex to real heirship the contradiction of taking by purchase, what principle of our law would have remained to resist

stripping the title by succession of all the other effects and consequences legally appropriated to it? Why might it not have given to purchase the qualities of descent? It is a positive rule of our law, that a man cannot raise a fee simple to his own right heirs as purchasers, either by legal conveyance, or by conveyance to uses. By this it is meant, that where the ancestor wills that at his death his heirs shall, by gift from him, come to that very inheritance which the law of descent and succession throws upon them, it is construed as a vain and fruitless attempt to give that to the heirs which the law vests in them. It amounts to a prohibition upon the ancestor against making his heirs purchasers, by giving at his death what the law confers without his aid. But this rule applies only to the acts of the ancestor; it was therefore requisite to have a like barrier as to acts between persons not standing in that relation towards each other. This is effected by the rule in Shelley's case. Thus explained, says he, the rule in Shelley's case can no longer be treated as a medium for discovering the testator's intention. The ordinary rules for the interpretation of deeds should be first resorted to. When it is once settled that the donor or testator has used words of inheritance, according to their legal import; has applied them intentionally to comprise the whole line of heirs to the tenant for life; has made him the terminus, by reference to whom the succession is to be regulated; then the rule in Shelley's case applies, and the heir shall not take by purchase. But if it shall be decided that the testator or donor did not mean to involve the whole line of heirs to the tenant for life; did not mean to engraft a succession on his estate, and to make him the ancestor or terminus; but instead of this, intended to use the word heirs in a limited, restrictive, and qualified sense; intended to point at that individual person who should be the heir at the moment of the ancestor's decease; intended to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the groundwork of a succession of heirs; to construe him or her the ancestor, terminus, or stock, for the succession to take its course from;—in every one of these cases, the premises are wanting upon which the rule in Shelley's case interposes its authority, and the rule therefore becomes extraneous matter.

III. Previously to Mr. Hargrave's publication, the rule in question had been discussed with infinite learning and ability, by Mr. Fearne, in his *Essay on Contingent Remainders*. In this justly celebrated work, Mr. Fearne observes, that the rule in Shelley's case is supposed to have been originally introduced to prevent frauds upon the tenure; and that if such a limitation had been construed a contingent remainder, the ancestor might, in many cases, have destroyed it for his own benefit; if not, he might have let it remain to his heirs in as beneficial a manner as if it had descended to him, at the same time that the lord would have been deprived of those fruits of the tenure which would have accrued to him upon a descent. He then minutely and accurately examines all the cases upon the subject, which had come before the courts of law and equity, and investigates very fully the principles upon which they were determined. He says, "that in the case of Perrin and Blake, the question is not whether the words, *heirs of the body*, may not, under certain circumstances, be taken as words of purchase; but whether those words, standing perfect, independent, and unexplained, and preceded by a limitation of the legal freehold to the ancestor in the same will, have ever been construed as words of purchase." To this he replies, "that not one of the cases, till that of Perrin and Blake, can fairly be urged in support of an affirmative answer to that question."

IV. "Our attention," (to adopt Mr. Fearne's masterly statement of it), "is next called to some observations of very high authority, upon the application of the rule. Lord Chancellor Thurlow, in the case of *Jones v. Morgan*, 1 Bro. Cha. Ca. 206. laid down some strong-featured positions, describing the outlines of a distinction applicable to all the cases in which that rule had been, or can be agitated. His lordship drew an inference from all the cases, that, where the estate is so given, that after the limitation to the first taker it is to go to every person who can claim as heir to the first taker, the word "heirs" must be words of limitation:—That all heirs, taking as heirs, must take by descent. In cases, he said, where he could bring it to the point that the testator, by the word "heirs" meant 1st, 2d, 3d, and other sons, there he would change the words of the will; but, in the case before him he thought the word "heirs" was the very thing meant.—Suppose, said his lordship, William had had a son, which son had had a son and died, leaving Sir William the testator, the eldest son of the son would have been heir. If there had been a title, he would have taken it; but the estate, if the words had been words of purchase, (that is, if they were construed to import limitations to the first and other sons of William successively in tail male,) must have gone to the second son; the devise to the first son being a lapsed devise, like the case of *White & White*; but Sir William Morgan meant the estate to go to whoever should be heir."

"The chancellor thought the argument immaterial, that the testator meant the first estate

to be an estate for life. He took it, that, in all cases, the testator did mean so. He rested it upon what the testator meant afterwards;—if he meant that every other person, who should be heir, should take, he then meant, what the law would not suffer him to give, or the heir to take, as a purchaser.—His lordship said, that in conversing with a great authority, he asked, what would become, in the case stated, of the grandson; that the answer was, he should take as heir. Lord Thurlow observed he knew he might; but then he must take by descent. All possible heirs, he said, must take as heirs, and not as purchasers: that in all cases where the limitation is of an estate of freehold to a man, and afterwards to his heirs, &c. (whether general or special), so as to give it to the heirs as a denomination or class, the heirs shall be in by descent and not by purchase. And that the case stated by Anderson in Shelley's case of a limitation to the use of *A.* for life, remainder to the use of his heirs and of their heirs female, was the only one to the contrary, and in that case the word "heirs" must be a description of the persons, in order to let in the limitation to the heirs female."

"Now," continues Mr. Fearn, "if the inference I have drawn from the very operative tendency of the law to hereditary descent, in its mode of approaching it, where the requisite ground for its perfect accomplishment is wanting, be just; if, from such premises, unopposed by any single repugnant decision or judicial opinion, the conclusion that the capacity of an heir to take the inheritance by purchase, so as to transmit it through the same line as by descent, is confined to those cases only where the ancestor takes no estate of freehold, be sufficiently founded, Lord Thurlow's doctrine embraces the subject to the full extent of his expression. For then, wherever the ancestor takes the freehold, the inheritance will not go to all the heirs, &c. in the course of inheritable succession, unless by an actual descent. And consequently, if after the first taker, it is to go to every person who can claim as heir to him, the intended succession can only be effectuated by taking the words "heirs," &c. as words of limitation. If after him all heirs, &c. are to take as such, that is, as answering that description, they can only take by descent. If the law will not admit of all possible heirs, &c. taking the inheritance, after its inception by a freehold in the ancestor, otherwise than by descent, it follows, that, wherever the limitation to the heirs, &c. after a freehold to the ancestor, is admitted to reach the whole denomination or class of heirs described, they must take by descent and not by purchase."

V. The very masterly discussions referred to in this note, will make the reader fully acquainted with the general merits of the case in question, and of the several points of legal learning, upon the discussion of which it either immediately or incidentally depends. But as the subject is necessarily of a very abstruse and intricate nature, and the arguments used in support of the different opinions respecting it are necessarily complicated and interwoven with one another, *the following discrimination of the leading points*, upon which the decision of the case must ultimately turn, will, perhaps, be useful to those who wish to obtain an accurate knowledge of the doctrine in dispute.

V. 1. Let us first suppose, that after a devise to a man for life, and a subsequent devise to the heirs of his body, the testator in express words declares it to be his intention, that, by the devise in question he means to give the ancestor an estate for his life only, and to give an estate in fee by purchase to his heirs: Is the rule in question of that very rigid and forcible nature as to be unaffected and *uncontrolled by these express words*? If the answer to this question is, that the express declaration of the testator will, in this case, control the legal operation of the words, heirs of the body, the next question is, Can any words short of an express declaration have this effect? or, in other language, Can that rule be *controlled by words of implication*? If the answer is in the affirmative, the next inquiry is, Whether to form such an implication as will control the rule, it is sufficient that it appears to be the testator's intention that the ancestor should take an estate for his life only? Or, must it also appear to be his intention that the heirs should take, not as descendants, but as purchasers? Must it further appear, *how or what estates* he intends the heirs to take? And *how and what estates* may the heir take by the law of England, his ancestor taking by the same instrument an estate for his life only?

Such, perhaps, will be the process of inquiry, if it is admitted, that there are cases where in devises of this nature, the heirs will take by purchase: but if that is not admitted; if it is asserted, that where a testator has once devised to a man for life, and afterwards to the heirs of his body, no other words, however positive and express, shall control the legal operation of the words, heirs of his body.

V. 2. It will then remain to inquire into the ground of the supposed inflexibility and rigidity of the rule.—Is it that it is *against the law* of the land, that lands should be conveyed to the ancestor for life with such estate or estates in remainder to the heirs of his body, as those heirs must be supposed to take, if they take as purchasers?—To resolve

this question with accuracy, it should first be settled what estate or estates the heirs of the body would take under this construction; and then it should be supposed that such estate or estates are devised by the most accurate and scientific legal expressions: if devises so worded would be held contrary to law, the necessary conclusion is, that *the object intended to be effected by the testator is against law.*

V. 3. If it appears that such estate or estates are not contrary to the law, but it still is contended that a devise to one for life, and after his decease to the heirs of his body, shall make the heirs take by descent, contrary to the testator's intention, the only remaining ground to support that conclusion is, that to make the heirs take by descent in devises of this nature, is a point of construction so fixedly and unalterably settled by judicial determination, that it is not now in the breast of any court to deviate from it. By investigating the rule in question under the above heads of inquiry, a regular and distinct view may, it is conceived, be obtained of the different points of law which relate to it, and of the different grounds upon which an opinion upon it may be framed.—It is greatly to be lamented that there should be so much uncertainty and difficulty in the application of a rule of law, to which resort must be so often had on the construction of wills. All parties agree that the rule has an existence; but, from the liberality which is allowed in the construction of wills, it has been contended that it does not extend to those devises to which it cannot be applied, without defeating the intention of the testator. It is certain that no rule of law has a more ancient origin, or is more generally established, than that if a testator expresses his intention defectively, either by not using technical and artificial terms, or by using them improperly, yet if his intention can be collected from his will, the law, however defective his language may be, will construe his words according to his intention; and if the object of it is warranted by the established rules of law and equity, will admit its full operation and effect. It is equally certain, on the other hand, that if the testator's intention appears to be to effect that, which the rules of law and equity do not admit, neither the courts of law nor the courts of equity can allow its operation. The first thing, therefore, to be ascertained, is, what the object of the testator is; the next, whether it is such as the rules of law and equity admit.

V. 4. To determine the last point, as soon as it is settled what the testator's intention is, let him be supposed to have expressed it, not in the words actually made use of by him, but in the most accurate and scientific language. If, when so expressed, its operation will be allowed, both at law and in equity, it must be admitted, on all hands, that it should have its operation and effect, notwithstanding any inaccuracy or impropriety used by the testator in his method of expressing it. But if, when expressed in artificial and scientific language, the law will not give it effect, it must equally be admitted, that it is no longer in the power of the courts to give it an operation; the fault of the testator's will being, not that he has expressed his intention inaccurately, but that the object of his intention is unlawful.

V. 5. To apply this reasoning to the case of *Perrin v. Blake*, what was the testator's intention? Supposing the heirs in that case to take by purchase, there are, it is conceived, but three constructions to be put upon such a devise.

The *first is*, to suppose, that the devise to the heirs of the body of the ancestor, to whom the life estate is limited, gives estates to his sons successively in tail, with remainders over in tail to his daughters as tenants in common. Devises of this nature are, unquestionably, conformable to law. They are the modifications of property most frequently introduced in the settlements of real estates. It follows, that if the words of the testator are construed in this sense, they are unobjectionable in point of law. But the courts of law have not thought themselves warranted to construe them in this sense; this construction, therefore, must be laid aside.

The *second construction is*, to suppose, that the testator's intention is to give the ancestor an estate of freehold, and to vest the inheritance in the person who, at the time of the ancestor's decease, should be the heir of his body, and to make that person the stock of the inheritance. It must be admitted, that this is perfectly lawful; and there is no doubt but a disposition of this nature, if framed in proper language, would be good, not only in a will, but in a deed. The question then will be, Whether that was the intention of the testator? It is obvious, that by the words heirs of the body, the testator means to comprehend *all* the heirs of the body of the devisee; but if the construction here contended for be admitted, only a particular series or line of such heirs will be admitted. None will be admitted but the person who happens at the time of the ancestor's decease to be the heir of his body, and the heirs of the body of that person; all the other heirs of the body of the ancestor will be utterly excluded. Thus, supposing him to have several sons, the eldest son would, at the time of the testator's decease, answer to the description of heir of his body; he, therefore, would take an estate by purchase; he would be the stock of the inheritance, and from

him the lands would descend upon all his issue. But the devise would reach no farther; it would not comprehend the other sons of the ancestor, or their issue. Thus, if this construction should be received, the intention of the testator will, to a great degree, be absolutely defeated. If there are no ulterior limitations or devises after the devise to the heirs of the body of the tenant for life, the reversion in fee will descend on the eldest son; and he may, consequently, dispose of it from his brothers and their issue. If there are any such ulterior limitations or devises, the persons claiming under them would take before, and to the total rejection of the other brothers and their issue. Of the second construction, therefore, must be repeated what was said of the first, that it is unobjectionable, in point of law, but that it is not conformable to the intention of the testator.

The *third construction* is, to suppose, that the inheritance will first vest in the person answering at the time of the decease of the ancestor, to the description of heir of his body; and that, on failure of issue of that person, it will vest in him who answers that description at the time of such failure of issue, and so on, while there are any such heirs remaining. This construction is conformable in some respects to the case of John de Mandeville, mentioned by Sir Edward Coke, ante 26 b. (and see the note in p. 505, of Mr. Douglas's Reports.) The question then is, Whether there is any thing unlawful in this intention? To ascertain this, let it be tried by the test above mentioned, that is, let us suppose it expressed in the most accurate and technical language. This will give the first son or his issue, at the time of the ancestor's decease, an estate tail; and upon failure of that line of issue, the lands will vest for an estate tail in the person who, at the time of the failure of the issue of the first-taking heir, will answer the description of heir of the body of the tenant for life, and so on till all the heirs of his body, and all their issue, are exhausted.—It is obvious, that a limitation of this nature differs materially from the limitations adopted in the first construction, viz. to the sons successively in tail male, with remainder to the daughters; for in that case the estate vests immediately in the first taker, and the other sons, and all the daughters, take vested remainders in tail. But, according to the construction we are now speaking of, all after the first taker, must be considered as taking, if the expression may be allowed, *quasi per formam doni*, conformably to the construction put on the limitation in Mandeville's case. Supposing even that they take by purchase, all the estates after that of the first taker must be contingent. In fact, it is not very easy to ascertain how they would take, and it might be found difficult to frame the language of the limitation. But certainly none of the other children, or their heirs, if this construction should be received, would take vested estates during the life of the first taker, or the continuance of issue of his body: for, till the events in question happened, it must be uncertain who, at the particular times in question, would answer to the description of heir of the body of the tenant for life; whereas, according to the first construction, all the children would answer the description under which they are designed, immediately upon their respective births. Such is the effect of this third construction.—Is there anything in the devise, construing it in this manner, and supposing it to be properly and accurately framed, that combats with any known rule of law? It is certain that such a limitation would be good, if the life estate, instead of being limited to the ancestor of the persons to whom the inheritance is afterwards limited, were limited to a stranger; as in the common case of a devise to A. for life, remainder to the right heirs, or the heirs of the body of I. S.—Why should its being a devise to the ancestor make a difference? It may even be contended, that a limitation and devise of this nature have been allowed in equity. In the case of Tipping v. Cosin, Carth. 272. there was a limitation, and in Lady Jones v. Lord Say and Sele, 8 Vin. 269. there was a devise of a trust estate to the ancestor for life, with a legal remainder after his decease to the heirs of his body. In both cases it was admitted, that on account of the different qualities of their estates, the freehold being equitable, and the inheritance legal, they did not coalesce so as to be within the rule in Shelley's case; but it was allowed to be a good remainder in tail, in the heirs of the body of the ancestor; and in the former of these cases the verdict was for the person claiming the remainder. It may be answered (and certainly with great appearance of reason), that, on account of the different nature and quality of the estates, the mischiefs intended to be obviated by the rule in Shelley's case could not follow from admitting the heirs to take in these cases by purchase. Considering it with respect to the feudal principles, which are supposed to have given occasion to the rule, the lord would not have lost the fruits of his tenure, nor would the fee have been put into abeyance. This case, therefore, proves nothing in favour of the legality of the estates to be raised by the construction here contended for. This point is exhausted by Mr. Hargrave's treatise upon it. If the reader be convinced by it that the estates to be raised by this third construction are not such as the law admits, it follows, that supposing the devise in question to operate so as to give the heirs an estate by purchase, it must be

construed in one of the former modes. Now these modes are not reconcilable with what is acknowledged to be the general scope and object of the testator's intention. The consequence is, that the devise must be left to its legal operation, and the heir must take by descent.

V. 6. But if the reader should be of opinion that the estates which, if the third construction is admitted, will be created by the testator's will, are such as the law allows, still there will remain a formidable objection to the admission of that construction. It will appear, that by a series of adjudications, from the 18 Ed. II. to the case of *Coulson v. Coulson*, 17 Geo. II. inclusively, devises of the nature in question have been construed to vest the inheritance in the ancestor. Admitting therefore that the reason or foundation of the construction in question is not now discoverable, there still is great reason to contend that it is binding on the courts. This is by no means peculiar to the rule in *Shelley's case*. There are many other rules of construction received by the courts, which are arbitrary, and some of them not reconcilable to plain reason. Still, being adopted as rules of construction, the courts (sometimes even with an avowed reluctance) consider themselves to be bound to submit to them.

VI. It remains to observe, that the suggestions here submitted to the reader, are intended to apply only to the devises of legal estates, and to those devises only in which the argument to except them from the rule in *Shelley's case* depends at the most on the two following circumstances: 1st, that it evidently appears to be the testator's intention to give the ancestor an estate for his life only: and 2dly, that it also evidently appears to be his intention that the heirs of his body should take by purchase. If the testator's intention appears to be to give the ancestor an estate for life only, and to give an estate by purchase to the heirs of his body; and if, besides this, his intention is, that by the devise to the heirs the inheritance should vest in that individual heir who, at the time of the decease of the tenant for life, shall be the heir of his body, and the heirs of the body of that person, and that the devise should reach no farther; or his intention is, that the inheritance should descend upon the sons of the tenant for life successively in tail, with or without remainders to the daughters; and this ulterior intention appears from any other part of the will, either by plain declaration, or clear implication; then, as there is nothing unlawful in this disposition of his property, there is no rule of law or equity that stands in the way of such construction.—But this ulterior construction is not to be implied from the mere circumstances of an estate for life only being given to the ancestor, and its appearing either by express words or implication, that it was the testator's intention to give an estate by purchase to the heirs.—It may be said this brings the matter to as much uncertainty as attended it before: but surely that is not the case. Numberless as the cases respecting the point in question are, there are few indeed, in which any ground for this ulterior construction of the words, "heirs of the body," occurs. See those cited by Mr. Justice Blackstone, in *Mr. Hargrave's Tracts*, 505, 506.

Since the first publication of this note, all the learning respecting this celebrated rule of law, particularly with a view to its application to decided cases, and to those which occur, or are likely to occur on it, in practice, has been ably collected and arranged by Mr. Preston, in his *Succinct View of the Rule in Shelley's Case*.—[*Butler*, note 329.]

NOTE V.

(Page 245 of this volume.)

The doctrine of warranty was formerly one of the most interesting and useful articles of legal learning; but the effect and operation of warranties having, by repeated acts of the legislature, been reduced to a very narrow compass, it is become in most respects a matter of speculation rather than of use. In some instances, however, warranties have still a powerful influence on our landed property; and there is no part of our jurisprudence to which the ancient writers have more frequently recourse to explain and illustrate their legal doctrines. Hence abstruse, and in most respects obsolete, as the learning respecting it unquestionably is, it continues to deserve the attention of every person who wishes to obtain accurate notions of those branches of our laws, which are more immediately connected with the doctrines that respect the alienation of landed property.

In the civil law warranty is defined, the obligation of the seller to put a stop to the eviction, and other troubles which the buyer suffers, in the property purchased. Eviction is defined to be the loss which the buyer suffers, either of the whole thing that is sold, or of a part of it, by reason of the right which a third person has to it. The other troubles are

those which, without touching the property of the thing sold, diminish the right of the purchaser; as if any one pretends a right to the usufruct of the lands sold, to a rent issuing out of them, to a service, or any other thing of the like nature. The buyer being thus evicted or troubled in his possession, has his recourse to the seller to warrant him. This warranty is either *in law*, being that security which every seller is bound to give for maintaining the buyer in the free possession and enjoyment of the thing sold, although the sale makes no mention of it; or *in deed*, being that kind of particular or conventional warranty, which the seller and buyer regulate among themselves. See *Domat*. l. i. tit. 2. §. 10. By the practice of the *Roman law*, the buyer might, immediately after the eviction or trouble, give notice of it to the seller, who then, if he thought proper, might make himself a party to the action, and defend it; but till the sentence was pronounced, the buyer could not bring his action of warranty against the seller; and the action was brought before the judge of the place in which the seller was domiciliated. But the practice is different in the courts of law in *France*. There the buyer, when he gives notice of the action to the seller, may bring his action of warranty against him before the judge, before whom the original action is brought; and if he cannot defend the action, the judge condemns him to indemnify the seller, by the same sentence by which he pronounces in favour of the plaintiff in the original cause. See *Pothier Traité des Contrats de Vente*, partie 2. c. 1. sect. 2. art. 5. §. 2. The first warrantor may call upon another to warranty; he in the same manner may call upon a third. But to prevent the delays which must unavoidably ensue from multiplying warranties, a fourth warrantor is not permitted to intervene, except in particular circumstances. The degrees also must be observed. Each person must vouch his own immediate warrantor, as it is not lawful for him to vouch any of the ulterior warrantors. After the warrantor has entered into the warranty, the person warranted may either proceed in his defence jointly with the warrantor, or leave the cause to him solely. The sentence binds them both equally. If the person against whom the action is brought be evicted or troubled in his possession by the sentence of the judge, he has a claim upon the warrantor for a complete indemnification. Sometimes the precise sum to be paid by way of indemnity is fixed and agreed to by the parties upon the making of the contract; but penal obligations of this nature are greatly discountenanced by the laws of France. It is always in the breast of the judge to moderate or increase them; but they cannot be increased either by the express contract of the parties, or the equity of the judge, to more than double of the property evicted. See *Traité des Evictions et de la Garantie Formelle*, par Mons. Berthelot, 2 vol. oct. Paris, 1781.

The warranty treated of by Littleton in this Chapter is evidently of *feudal extraction*, being derived from the obligation which the lord was under, by that system of polity, to defend his tenant's title to the land against all claimants. If the tenant was evicted, the lord was bound to make him a recompense, by giving him lands of equal value to those evicted from him. The doctrine and practice of warranty, in the early ages of the feudal law, is thus set forth in the book of the Fiefs, tit. 25. It is there stated that a vassal held a fief from the lord, and being disturbed in his possession of it, called upon the lord to defend him. The lord refused to appear before the judge, by which the vassal lost his cause. The vassal thereupon demanded a recompense from the lord. The lord said in answer that the vassal never held the fief, nor received the investiture of it from him. The vassal replied, that he held the fief from the lord, and had been invested with it by him; that he had called upon the lord to defend the possession on the trial, and that the lord did not then deny the lands being held of him. All this the vassal proved by proper witnesses. Upon this case it was held, that when a vassal is disturbed in the possession of his fief, if he calls on the lord to defend him, and it appears on the trial that the lord invested him with a fief that did not belong to him, the lord is bound either to give him another fief of equal value, or the price of it in money; and that he is bound to do this as soon as it clearly appears that the vassal will be evicted of the fief; but that if the lord denies that the fief is held of him, and that the vassal, or any of his ancestors, were invested with it by him, and the vassal proves those facts, either by an instrument properly authenticated, or by the peers of the court, the lord must give him another fief; or may be put to his oath, that neither the vassal nor any of his ancestors held the fief from, or were invested with it by him, or any of his ancestors. If the lord does this, he is to be acquitted.—Sir Martin Wright seems to question whether the lord's obligation to protect or defend the feudatory, made him anciently liable upon eviction, without any fraud or defect in him, to compensate the loss of the fief. He observes, that it can hardly be imagined that while feuds were precarious, and held at the will of the lord, or indeed, that while they were generously given, without price or stipulated render, the lord should be subject to such a loss; especially since it is likely that the lord's obligation upon eviction rather prevailed upon the reason of

contracted and improper feuds, than from the nature of a pure original feud. He observes, that none of the ancient feudists make any such distinction, but that all of them suppose the lord's obligation upon eviction to have been general; yet he asserts they must be understood to speak of the times in which they wrote, when improper feuds chiefly prevailed. See *Introduc. to the Law of Tenures*, pp. 38, 39, 40.—Upon a principle similar to that upon which this distinction is grounded, it seems to have been formerly made a question by the writers on the feudal laws of the German and Italian States, whether investiture alone, without any express promise or undertaking on the part of the lord, entitled the tenant to claim an equivalent from the lord, in case of eviction. Rosentall, a German feudist of great authority, has stated this question, and the authorities upon which the two opposite opinions respecting it are founded. He mentions it to be his own opinion, that investiture alone, without any promise, entitled the tenant to an equivalent; and he says, that the greatest part of those who maintain the opposite opinion, admit that the lord, though he has made no promise, is bound to give an equivalent, if the fief were originally granted for services done; or otherwise, in the way of remuneration. See *Rosentall Tractatus et Synopsis totius Juris feudalis*, Coll. Allob. 1610. vol. 1. 469, 470.—In a more recent publication, expressly on the subject of gratuitous fiefs, it is held, that the lord is bound to defend the fief and to give the tenant an equivalent, if it is evicted from him. The author states the objection made by Sir Martin Wright; and in answer to it observes, that the feudal contract and connexion between the lord and tenant is such, as distinguishes it from a voluntary donation, and necessarily includes this obligation upon the lord. See *Petri Schultzi Dissertatio de Feudo Gratie in Jenichen Thesaurus Juris feudalis*, Francofurti ad Mœnum, tom. 2. 556, 567, 568. It should seem that with us anciently, every kind of homage, when received, but not before, bound the lord to acquittal and warranty; that is, to keep the tenant free from distress, entry, or other molestation, for services due to the lords paramount, and to defend his title to the lands against all others; but that in subsequent times, the implied acquittal and warranty were peculiar to that species of homage which is known by the appellation of homage ancestral. See ant. 67 b. note 1. In another material quality, the warranty annexed to homage ancestral differed from express warranty. In the case of express warranty the heir was chargeable only for those lands which he had by descent from the ancestor who created the warranty. But in the case of homage ancestral the tenant was not driven to recover in value only those lands which the lord had from that ancestor who created the warranty; that would be impossible, as it was essential to homage ancestral, that the seignory should have been created before time of memory. It being therefore impossible to ascertain which lands descended from the ancestor who made the grant, the law charged all the lands. See ant. 102 b. But defence and recompense were not the only benefits which the tenant derived from the lord's warranty; it rebutted or repelled the lord from claiming the land itself, or any profit or right from it, but those which under the feudal contract were due to him as lord, according to the fundamental maxim of the doctrine of fiefs, *Homagium repellit perquisitum*. Such appear to be the outlines of the system of warranty in the early ages of the feudal law. The practice of subinfeudation necessarily occasioned a considerable extension of it. It was totally inhibited by the statute made in the 18th year of Edward I. commonly called the statute *quia emptores terrarum*. That statute had a particular influence both on the practice and the doctrine of warranty. The free alienation of property which it authorized necessarily put an end to the homage ancestral, and consequently to the implied warranty annexed to it. To remedy this, if the lord aliened, the tenants, before they attorned to the new lord, required a new warranty from him; if the tenant aliened, it was with an express clause of warranty. This gave the new tenant the benefit of the lord's obligation to warrant the old tenant: as the new tenant might vouch the old tenant, and he in his turn might deraign the lord. This subject will be pursued, and an attempt will be made to investigate and explain the grounds of the distinction between lineal and collateral warranty, in note 2. 373 b.—[Butler, note 315.]

NOTE VI.

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What is said by Sir Edward Coke in this place, and the determination of the judges in *Nokes's case*, 4 Rep. 80. and Lord Chief Justice Vaughan's argument in *Hayes v. Bickerstaff*, in his Reports, page 126. should remove the scruples too often entertained on the part of trustees, respecting the propriety of their conveying by the word *grant*. From the passages here referred to, it most clearly appears, that the word *grant*, when used in the con-

veyance of an estate of inheritance, does not imply a warranty; and that if it did, the insertion of any express covenant on the part of the grantor, would qualify and restrain its force and operation within the import and effect of that covenant, as the law, when it appears by express words how far the parties designed the warranty should extend, will not carry it farther by construction. There is therefore no reasonable ground for trustees objecting to convey by the word *grant*; but serious objections may be raised in some cases to purchasers taking a conveyance from them without it. These are stated in the following passage from Bridgman's Complete Conveyancer, vol. 1. 323.—Sir Jeffrey Palmer's resolution concerning the words *give* and *grant* in a conveyance. "Sir, I conceive that care ought to be taken in a conveyance, of what nature soever it be, that there be not therein *give* and *grant*; for they imply a *general warranty*, and shall not be qualified by the *special warranty* following as hath of late been thrice adjudged. H. T."—Sir Jeffrey Palmer's answer. "*Give* implies a *personal warranty*, and so is not always used. The word *grant*, in a lease for years, is a *covenant in law*; or (as you may call it) a *general warranty*, if it be not qualified by a *covenant or warranty in fact*: but if there be a *covenant or warranty in fact*, then it is restrained to the words of the *covenant* subsequent. But in an *estate of inheritance* where the *fee* passeth, there the word *grant* is neither a *covenant in law*, nor *warranty*. For if it should be a *covenant in law*, or *warranty* in itself, it would be there restrained and qualified by the *warranty* and *covenants in fact*. And a *deed* to pass an *inheritance* where *common* is cannot be without it; for if it be *common in gross*, it cannot pass by the livery, but must pass the word *grant*. And I never yet saw a *feoffment* without it. Jeffrey Palmer." This dictum of Sir Jeffrey Palmer has been sometimes cited to prove that it is not safe for purchasers to take a conveyance by lease and release, or bargain and sale enrolled, if the conveyance be from the trustees, and they do not convey by the word *grant*. It is said that commons, or advowsons, or other things which be in *grant*, will not, if they are severed from the inheritance, pass without the word *grant*. But this is a mistake, and by no means warranted by Sir Jeffrey Palmer's dictum, which evidently applies only to conveyances by feoffment; in which case commons in gross, &c. lying in *grant* would not pass by the livery, and therefore without the word *grant*, or some other word of a similar operation, would not pass by the charter of feoffment. But in the case of a lease and release, there is no doubt, that any thing which lies in *grant* will vest in the vendee, by the lease for a year, and that a release without the word *grant*, would operate by way of enlargement to give the releasee the fee. So in the case of a bargain and sale enrolled, any thing which lies in *grant* will vest in the bargainee by the statute of Uses without the word *grant*. Upon the whole therefore there is no such peculiar operation in this famous monosyllable, as to make it either dangerous for a trustee to convey by it, or essential for a purchaser to require it. How a *covenant* shall be expounded with regard to the context, or to synonymous or other words, see Com. Dig. Cov. (D). Vin. Abr. Covenant (L 4.)

To explain more fully, what is said above, it may be proper to state at length the operation of the word "*grant*" or "*give*," in conveyances of estates in fee simple, in gifts in tail, in leases for life, and in leases for years.—1st. *As to the operation of the word "grant" or "give," in conveyances of estates in fee simple*, it is to be observed, that, till the practice of subinfeudation was abolished by the statute *quia emptores terrarum*, lands might be granted, either to be held of the grantor himself, or to be held of the chief lord of the fee. When they were granted to be held of the grantor himself, at least if the grant were made by the word "*dedi*," there, without any other warranty, the feoffor and his heirs were bound to warranty. This is enacted by the statute *de bigamis*, ch. 6. and we have Lord Coke's authority, that this statute was only declaratory of the common law, in this respect. The reason for implying warranty, in this case, is by his lordship said to be, that "*where dedi is accompanied with a perdurable tenure of the feoffor and his heirs, there dedi importeth a perdurable warranty for the feoffor and his heirs to the feoffee and his heirs.*" 2 Inst. 275. The warranty in this instance was therefore a consequence of tenure, (ant. 101 b.) and so necessary a consequence of it, that, where an express and qualified warranty was introduced, it did not restrain or circumscribe the implied warranty. Where lands were granted to be held of the chief lord of the fee, there the tenancy was of the chief lord, and no tenure subsisted between the grantor and the grantee. Warranty, therefore, being a consequence of tenure, did not hold in these cases between the grantor and grantee, as there was no tenure between them to raise it. Still, the grantor was supposed to be bound by his own gift. The word "*give*," therefore, imported, in this case, a warranty to him. But this was personal to the grantor; it did not apply to the heir, and it could not affect him without working that involuntary alienation, which, in a case of that nature, the jurisprudence of those times did not readily admit. The statute "*quia emptores terrarum*," put an end to the subinfeudation of fee simple estates, and of course put an end

to the warranty we have been speaking of, as incident to grants of lands in fee simple, to be held of the grantor and his heirs. The consequence was, that, after the statute *quis emptores terrarum*, there was no case, except that of homage ancestral, in which warranty, unless it arose from the express contract of the parties, bound more than the donor, or bound him longer than the term of his life. 2dly, *But with respect to estates tail and leases for life*, the judges took this important distinction, that, where a person seised in fee granted for life or in tail, reserving the reversion in himself, the grantees of the particular estates held of the reversioner, and he of the chief lord: where a person granted for life or in tail, with the remainder over in fee simple, both the tenants of the particular estates, and the remainder-men, held of the chief lord. In the former case, therefore, the tenure between the donor and the donees still subsisting, the law remained as it did before the statute, that is, when those estates were created by the word "*dedi*," both the donor and his heirs, were, in consequence of the tenure, obliged to warranty. Thus it stood in respect of grants in fee simple, in tail, or for life; and in all these cases the warranty must be understood in its strict legal import, as implying an obligation in the lord to acquit his tenant against the superior lord, where there was a seigniorial paramount, and to give the tenant a recompense in case of eviction. 3dly, *But in leases for years*, (to which the subject now leads), the case is very different. A lease for years, (See Bacon's Abr. tit. Leases and Terms for Years) is a contract between lessor and the lessee for the possession and profits of lands, &c. on the one side, and a recompense by rent, or other consideration, on the other. As the lessor contracts that the lessee shall hold the land, he cannot claim it in opposition to his covenant.—Thus he parts with the land during the term; but his supposed parting with the land, and the interest of the lessee in it during the term parted with, was rather a consequence of law accruing from the contract, than the contract for the enjoyment, a consequence of law, accruing from the parting with the land. The tenant, therefore, had only the perception of the profits, and was considered to hold the possession for the reversioner. The consequence was, that whoever recovered the freehold, reduced the term whether the recovery were true or feigned. As the possession was not considered to be in the lessee, there was originally no means by which he could recover it. His only remedy was in consequence of the contract, which constituted the lease. By virtue of that, the words "yielding and paying," &c. were construed a covenant in favour of the lord, which enabled him to recover his rent by an action of covenant or an action of debt, and the words, grant, demise," &c. were construed a covenant in favour of the tenant, which enabled him to recover damages as a recompense for the possession lost. In this sense they are said to imply a warranty. From the warranty of freehold estates it differs in its nature, as that arises from tenure, this from contract; and in its operation, as that, being a consequence of tenure, is not modelled by express warranties, this, arising from the contract of the parties, is considered to be modified and regulated by any express covenants inserted in the lease. See Spencer's case, 5 Rep. 17. 1 Lev. 57. and Clarke v. Samson, 1 Ves. sen. 101. Lord Coke, ant. 101 b. and post. 389 a. expressly says, that warranty cannot be annexed to chattels real or personal; for, says his lordship, if a man warrants them, the party shall have covenant or action upon the case. Thus, therefore, the law stands since the statute *quis emptores*. In all cases of homage ancestral, if any such now exist, (which is at least doubtful), the doctrine of warranty remains as it did before the statute, that is,—if the grant was made by the word "*dedi*," it imports a warranty. In other cases it may be expressed as the parties think proper; if it be not expressed, then, in conveyances in fee simple, it is not implied by the word "grant," or any other word except the word "give;" and then it holds only during the life of the grantor; in gifts in tail, and in leases for life, by the word "give," where the reversion is left in the donor, the tenure between him and the donee or lessee still continues. Of that tenure it is a necessary consequence of law, and is not considered to be restrained by any express covenants. In leases for years rendering rent, warranty, considering it to import a covenant for the quiet enjoyment of the term, is of the essence itself of the lease; but the lease being originally founded on contract, any of its terms may be varied by the parties themselves at their pleasure, and is in fact considered as varied *pro tanto* by the insertion of any express covenant. But the effect of an express covenant in restraining the effect of an implied general covenant is not to be confounded with the effect of a particular covenant in restraining the effect of an express general covenant, as the latter is not restrained by a subsequent covenant, unless it can be considered as part of the general covenant. See Nokes's case, 4 Rep. 80. and 1 Saund. 60.—It may happen, that a person having a term of years only, conveys the lands as an estate in fee simple to another and his heirs, by the word "grant." But this cannot amount to a warranty of the lands, for the term. The operation of the word "grant," in implying a warranty in the creation or assignment of a term, arises from

implication only, that is, from the law's presuming, by the party's using the word "grant," that he intended to warrant the lands as a term. But his expressly treating the land in the deed as a fee simple estate, and expressly conveying it as such, necessarily rebuts every implication of its being his intention or undertaking to convey it as a term of years. In what has been said above, the grantor is considered as the real owner of the land, receiving the purchase money, or other consideration of the estate or interest parted with. In this case, independently of all construction of particular words, there is great reason to consider him bound to warrant the property he parts with, as he receives the benefit of it. In the case of a trustee, this ground of raising or implying an obligation of warranty necessarily fails. Upon the whole, to apply what has been said to the point mentioned at the beginning of the note, it appears clear, that whenever there is a deed, on the face of which the trustee is party, and conveys, merely as trustee, there is no substantial objection to his conveying by the word "grant." If the lands are freehold, it is clear that no warranty or covenant is imported by it; if it happens that they are held for a term of years only, all implication of an intention or undertaking to convey them for the term, is necessarily rebutted by their being treated in the deed, and conveyed by the party as a fee simple estate; and if any such warranty or covenant would otherwise be implied, it would be restrained, by his covenant that he himself has done no act to encumber, to a warranty or covenant against his own acts. To obviate, however, every doubt which may be entertained on this ground, it is usual to make the trustee convey "according to his estate, right, or interest, but not further or otherwise,"—or to express that he grants, &c. "not as warranting the title, but in order to pass or convey the lands." Whenever the former words are inserted, care should be taken to make them referrible to the trustee only, and not to the owner of the fee; who, in express contradiction from the guarded mode of conveyance applied to the trustee, should be made to "grant," &c. "fully and absolutely."

It remains to inquire what remedy a person purchasing under a defective title has, exclusively of the purchaser's warranty or covenants, or where the title is subject to a defect, which the warranty or covenants do not reach. In every case where the seller conceals from the purchaser the instrument or the fact which occasions the defect, or conceals from him an encumbrance to which the estate is subject, it is a fraud, and the purchaser has the remedy of an action on the case, in the nature of an action of deceit. But a judgment obtained after the death of the seller, in an action of this nature, can only charge his property as a simple contract debt, and will not, therefore, except under very particular circumstances, charge his real assets. A bill in chancery, in most cases, will be found a better remedy. It will lead to a better discovery of the concealment, and the circumstances attending it, and may in some cases enable the court to create a trust in favour of the injured purchaser. But where the instrument or the fact, which occasions the defect of the title, or the instrument creating the encumbrance, is produced, the purchaser has fair notice given him of it, and if the covenants do not extend to it, he appears to be without remedy, unless he can avail himself of the covenants of the earlier vendors, many of which are inherent to the lands, and to some of which, as the covenant for quiet enjoyment, there is no objection, on account of their antiquity, where the breach is recent. It sometimes happens, that a purchaser consents to take a defective title, relying for his security on the vendor's covenants. Where this is the case, this should be particularly mentioned to be the agreement of the parties; as it has been argued, that, as the defect in question was known, it must be understood to have been the agreement of the purchaser to take the title, subject to it, and that the covenants for the title should not extend to warrant it against this particular defect. On the general doctrine respecting the usual covenants for title, see Mr. Sugden's Law of Vendors, Ch. 13.—[Butler, note 332.]

NOTE VII.

(Page 280 of this volume.)

The reader will recollect, that previously to the statute *de donis* all estates were held either in fee simple, in fee simple conditional, for life, or for years; and that estates tail, in the light in which we now consider them, had not then an existence. If a person seised in fee simple aliened his estate, the alienation was certainly binding both upon his lineal and his collateral heirs; his warranty therefore had effect so far as it entitled the alienee to vouch the heir of the warrantor, and, in case of eviction, to claim a recompense from him, if any real assets descended upon him from the ancestor: but with respect to the repelling or rebutting of the claim of the heir to the estate itself, as the alienations of tenant in fee

simple bound the heirs as effectually without the warranty as with it, the warranty, in that respect, could have no operation.

As to the warranties of persons seised of estates held in *fee simple conditional*, it has been observed before, p. 326 b. note 1. that the condition from which that estate took its appellation did not suspend the fee from vesting in the donee immediately by the gift; and therefore if he aliened before he had issue, it not only was no forfeiture, but if afterwards he had issue, it was a bar to them. Hence the warranty of a tenant in fee simple conditional had the same effect with respect to his issue, as the warranty of tenant in fee simple absolute had upon those who claimed from him; that is, with assets, it entitled the warrantee to vouch the issue as heirs at law of the ancestor; but in other respects it had no operation, as the issue was bound by the alienation of the ancestor, as effectually without warranty as with it. With respect to the donor or reversioner, the alienations of tenant in fee simple conditional could not be binding on him without assets, because he claimed to be in by title paramount.

As to the warranties of tenant *for life or for years*: in most cases they must have been void, as commencing by disseisin. In those cases where they were not void upon that account, it is to be observed, that before the statute of Uses an estate of freehold could not be created without livery of seisin; and that as the livery of seisin of tenant for life or for years was a forfeiture of the estate, the reversioner or remainder-man might enter immediately for the forfeiture; but if he did not enter during the life of the person aliening, the warranty estopped him from entering afterwards. The reader will recollect, that if a disseisor, abator, or intruder, died in the possession of the estate, his heirs so far acquired a presumptive title to the estate, that the disseisee could no longer restore his possession by entry, but was reduced to his action. By analogy to this reasoning, and a rational extension of the principles on which it was founded, the law supposed that the remainder-man or reversioner would have entered for the forfeiture of the tenant for life or years, if an equivalent were not given him: it was therefore presumed, that if he did not enter during the life of such particular tenant, he had received from him an equivalent; and this presumption being admitted, he could not afterwards, with any colour of justice, be allowed to claim the estate itself.

Such were the effects and operations of warranty at the common law.

The first material alteration in it was by the statute of Gloucester, 6 E. 1. ch. 3. by which it was enacted, that the warranty of the father, tenant by the curtesy, either in the life of his wife or afterwards, should not be a bar to the heir without assets. The next statute which made any material alteration upon the effect and operation of warranty, was the statute *de donis*. An attempt has been made in note 1, page 326 b. and notes 1 and 2 to page 327 a. to explain in what manner, and by what construction of law, estates tail derived their origin from that statute. It is obvious, that if the warranty of tenant in tail, without assets, had been permitted to be a bar of the estate tail, it would have been in the power of every tenant in tail to have evaded that statute, and barred his issue. By a kind of analogy, therefore, to what the legislature had done in passing the statute of Gloucester, the judges in their construction of the statute *de donis*, held, that the warranty of tenant in tail, without assets, should not bind his issue; but by the same analogy, and to prevent the circuitry which would arise if the issue had been permitted to recover the estate from the alienee, and the alienee to recover the assets from the issue, they held the issue bound by warranty with assets.—With respect to those in remainder or reversion—it is to be observed, that the statute *de donis* extends only to the alienations of tenants in tail; the alienations, therefore, of tenants for life with warranty, remained as they did at the common law, and therefore bound all upon whom the warranty descended, either with or without assets. Neither did the statute *de donis* restrain the alienations of tenant in tail, except so far as they prevented the land descending upon the issue at his death, or reverting to the donor for want of issue in tail. There is nothing in it which, either directly or indirectly, restrains the tenant in tail from barring a remainder-man in tail, by his warranty descending on him, unless perhaps it should be considered that every particular estate in remainder is carved out of and a part of the reversion, and consequently equally entitled to protection. As to a remainder-man in tail, therefore, the operation of warranty in rebutting the heir, remained as it was before the statute; it barred him both with and without assets. This is laid down and explained with great learning and force of argument by lord chief justice Vaughan, in his argument in *Bole v. Horton*. See his Reports, p. 360. The case there was, that William Vescy devised to John Vescy, his eldest son, and the heirs male of his body; and for want of such issue to William Vescy, another of his sons, and the heirs male of his body; and for want of such issue to his own right heirs. John, upon his father's death, entered, and died, leaving issue only two daughters: William then entered

and aliened with warranty, and died without issue. The question was, whether the warranty rebutted the daughters. Lord chief justice Vaughan was of opinion, that the warranty, not being accompanied with assets, would not have barred his own issues in tail, if there had been any, or the two daughters, who claimed the reversion, both issues in tail and the reversioners being protected by the statute *de donis*: but he admitted, that if there had been any intermediate remainder in tail, the warranty would have rebutted all who claimed under that remainder, a remainder in tail not being under the protection of the statute. The only point before the court in this case was, upon the operation of the warranty to rebut the reversioners. Upon this the court was divided; the chief justice and justice Archer were for the demandant; and justice Wyld and justice Atkins for the tenant. The next statute which restrained the operation of warranty was 11 Henry 7. ch. 20. by which the warranty of the wife of her husband's lands, either with or without her succeeding husband, was held to be void. The last statute which has been enacted for the purpose of restraining the operation of warranty, is the 4 and 5 Ann. ch. 16. by which all warranties of tenant for life are declared void; and all collateral warranties of any ancestor who has not an estate of inheritance in possession, are declared void against the heir. But this statute does not extend to the alienation of tenant in tail in possession. The consequence is, that even at this day, if a tenant in tail in possession discontinues his estate with warranty, it is a bar with assets to his issue, and without assets to those in remainder. Supposing, therefore, the common case of a limitation to the first and other sons successively in tail male; if the first son, when in possession, levies a fine, that is a discontinuance of the remainders to the other sons; and by reason of the warranty contained in the concord, it is a bar to them, even without assets. It is the same if he executes a feoffment, and accompanies it with a warranty. It remains to observe, that no warranty extends to bar any estate, either in possession, reversion, or remainder, unless before, or, at least, at the time that the warranty is made, it is divested or displaced. See Seymour's case, 10 Rep. 96.—These, it is presumed, are the general outlines of the doctrine of warranty. The reader will observe, by what has been said on that subject, that at common law, the operation of a warranty to rebut the heir could hold in no case where the heir claimed the estate warranted from the ancestor by descent; for, at the common law, wherever the ancestor had the inheritance, he could alien it from the issue; therefore the warranty, as to the purpose of rebutter, was perfectly inoperative. The statutes have made no alteration in these respects. Had it been held that the statute *de donis* did not restrain the effect of the warranty to rebut the issue, this principle would have been broken into, as the heir in that case would have been rebutted by his ancestor's warranty from an estate which he claimed to take from him by descent; but as the contrary construction was received, the principle remains as it did at the common law. The consequence is, that without assets the ancestor's warranty never did, and does not now bind the heir in any case, except where he takes by purchase; and that when he does take by purchase, it binds him either with or without assets, in every case where the contrary has not been enacted by statute. Upon inquiry it will be found, that the cases where the operation of warranty still prevails are reduced to two; the first, that by the construction of the statute *de donis*, the ancestor's warranty binds the issues in tail with assets; the other, that, at common law, the warranty of the ancestor, tenant in tail in possession, still continues (unless the contrary can be supported on the ground before hinted at) to bar those in remainder without assets. It is observable, that all warranties are collateral, so far as they are extraneous to the estate, and by way of contradistinction to those rights, incidents, or qualities, which by their nature are inherent in, annexed to, or issuing out of the estate which they accompany. In this sense the word collateral frequently occurs in our law books. Thus, 1 Rep. 121 b. an use at common law is said to be a trust or confidence, not issuing out of land, but a thing *collateral*, annexed in privity to the estate. In the same sense it is used in the well-known distinction between powers relating to the estate of the donee of the power and *collateral* powers. Thus, whether the warranty descends lineally or collaterally, whether the estate and the warranty descend from the same person or from different persons, and whether the warranty is considered as to its operation of rebutting the heir, or of entitling the alienee to vouch the warrantor, it is, in its nature, collateral to the estate which it accompanies. If in some cases it bars the heir from claiming, and in others it does not, it is only because the statute law has said, that in some cases where by the common law it would have operated as a bar, it shall no longer have that operation; and if, by the statute *de donis*, the warranty of tenant in tail did not bar the issue without assets, but barred it with assets, this is not from any pre-established distinction between lineal and collateral warranty, but because the judges, upon the construction of the statute *de donis*, held the issues in tail and the reversioner should not be deprived of the estate by the indirect and

circuitous operation of warranty, when that statute had declared they should not be deprived of it by the direct alienation of common-law conveyances.—The chief part of the observations offered to the reader in this note are grounded on what was said by Lord Vaughan in the argument above referred to: he concludes it by saying, “The doctrine of the binding of lineal and collateral warranties, or their not binding, is an extraction out of men’s brains and speculations many scores of years after the statute *de donis*.—And if Littleton (whose memory I much honour) had taken that plain way in resolving his many excellent cases in his Chapter of Warranty, of saying the warranty of the ancestor doth not bind in this case, because it is restrained by the statute of Gloucester, or the statute *de donis*; and it doth bind in this case, as at the common law, because not restrained by either statute (for when he wrote there were no other statutes restraining warranties, there is now a third, 11 H. 7.) his doctrine of warranties had been more clear and satisfactory than now it is, being intricated under the terms of lineal and collateral; for that in truth is the genuine resolution of most, if not of all his cases; for no man’s warranty doth bind, or not, directly, and *a priori*, because it is lineal or collateral; for no statute restrains any warranty under those terms from binding, nor no law institutes any warranty in those terms; but those are restraints by consequent only from the restraints of warranties made by statutes.” Vaugh. 375.—Lord Holt is also reported to have said, “The true reason of collateral warranty was the security of purchasers, and for their encouragement; as also, for the establishing and settling the estates of such as were in by title, or descent cast: and this was the only security such persons could have at common law. And because the estate of such persons as are in by title are much favoured in law, these covenants that were for strengthening of them were favoured likewise. And in those days there was no need of lineal warranty; but, however the force of that is taken away by the statute *de donis*, and common recovery is not upon the supposition of recompense in value, and never was within the statute, but always as much out of it as if it were so mentioned by express words.” And this, he said, was my Lord Hale’s opinion. 12 Mod. 512.—[Butler, note 328.]

NOTE VIII.

(Page 239 of this volume.) See Note IV.

NOTE IX.

(Page 586 of this volume.)

Many references have been made, in the foregoing notes, to this part of the work, for some observations on conveyances at common law, and those which derive their effect from the statute of *USES*. It appeared advisable to collect them into one continued note, that the difference between the two modes of conveyance might appear in a stronger light; and to prevent a necessity of frequently repeating those general principles and illustrations, which otherwise must have been introduced, on every occasion, where any point of this nature seemed to require an explanation. On the same ground, it seemed advisable to anticipate some passages which otherwise would have had a place in a subsequent part of the notes.

I. **FEOFFMENTS** and **GRANTS** were the two chief modes used in the **COMMON LAW** for transferring property.

I. 1. The most comprehensive definition which can be given of a *feoffment*, seems to be, a conveyance of corporeal hereditaments, by delivery of the possession upon, or within view of, the hereditaments conveyed. The delivery of the possession was made on, or within view of, the land, that the other tenants of the lord might be witnesses to it. No charter of feoffment was necessary: it only served as an authentication of the transaction; and, when it was used, the lands were supposed to be transferred, not by the charter, but by the livery, which it authenticated. Soon after the Conquest, or perhaps towards the end of the Saxon government, all estates were called fees. The original and proper import of the word feoffment is, the grant of a fee. It came afterwards to signify a grant, with livery of seisin, of a free inheritance to a man and his heirs, more respect being had to the perpetuity, than the feudal tenure of the estate granted. In early times, after the Conquest, charters of feoffment were various in point of form. In the time of Edward I. they began to be drawn up in a more uniform style. The more ancient of them generally run

with the words *dedi, concessi, or donavi*. It was not till a later period, that *feoffavi* came into use. The more ancient feoffments were also usually made in consideration of, or for, the homage and service of the feoffee, and to hold of the feoffor and his heirs. But, after the statute *quia emptores*, feoffments were always made, to hold of the chief lords of the fee, without the words *pro homagio et servitio*. Sir Edward Coke mentions in page 6 a. that there are eight necessary parts of a feoffment. The fifth, sixth, and seventh of these are not to be found in many of the ancient charters. When the land comprised in the feoffment descended from the ancestor, or by usage retained the property of the ancient bockland, of not being alienable from the kindred, the ancient feoffments were often expressed to be made with the assent of the feoffor's wife, his heir or his heirs. In ancient charters there was inserted a general warranty: in that, the phrase was much varied. The oath of the party was often added to it, and sometimes a clause, that if the feoffor's title was evicted, he should give other lands of equal value. Sometimes these clauses extended to a second eviction; and sometimes the feoffor obliged himself, if he should make default in warranting the lands granted, to make restitution to the feoffee. The proper limitation of a feoffment is to a man and his heirs; but feoffments were often made of conditional fees (or of estates tail, as they are now called), and of life estates; to which may be added, feoffments of estates given in frankmarriage and frankalmoigne. To make the feoffment complete, the feoffor used to give the feoffee seisin of the lands: this is what the feudists called investiture. It was often made by symbolical tradition: but it was always made upon, or within view of, the lands. When the king made a feoffment, he issued his writ to the sheriff, or some other person, to deliver seisin: other great men did the same. This gave rise to powers of attorney. (See the Preface to Mr. *Madox's Formulæ*.)

I. 2. A *grant*, in the original signification of the word, is a conveyance or transfer of an incorporeal hereditament. As livery of seisin could not be had of incorporeal hereditaments, the transfer was always made by writing, in order to produce that notoriety in the transfer of them, which was produced in the transfer of corporeal hereditaments, by delivery of the possession. But, except that a feoffment was used for the transfer of corporeal hereditaments, and a grant was used for the transfer of incorporeal hereditaments, a feoffment and a grant did not materially differ.

I. 3. Such was the original distinction between a feoffment and a grant. But, from this real difference in their subject matter, a difference was supposed to exist in their operation. A feoffment visibly operated on the *possession*; a grant could only operate on the *right* of the party conveying. Now, as possession and freehold were synonymous terms, no person being considered to have the legal possession of the lands but he who had the actual freehold of them, a conveyance which was considered as transferring the possession, must necessarily be considered as transferring the freehold; or to speak more accurately, as transferring the whole fee. But this reasoning could not apply to grants; their essential quality being that of transferring things which did not lie in possession; they therefore could only transfer the right; that is, could only transfer that estate which the party had a right to convey. It is in this sense we are to understand the expressions which frequently occur in our law-books, where they describe a feoffment to be a *tortious*, and a grant to be a *rightful*, conveyance. Thus, from a difference in the *quality* of the hereditaments conveyed by these two modes of conveyance, a difference has been considered to exist in their operation. A great part of Mr. Knowler's celebrated argument in the case of *Taylor on the demise of Atkins v. Horde*, turns on this distinction. See 1 Burr. 92. This appears to have been the outline of conveyances at the common law.

II. The introduction of *USES* produced a great revolution in the transfer and modification of landed property. Without entering into a minute discussion of the difference between uses at common law, and uses since the statute of 27 H. 8.—a point, particularly well explained in Mr. *Sanders's Essay on Uses and Trusts*, it is sufficient to state the following circumstances. Uses at the common law were, in most respects, what trusts are now. When a feoffment was made to uses, the legal estate was in the feoffee. He filled the possession, did the feudal duties, and was, in the eye of the law, the tenant of the fee. The person to whose use he was seised, called by the law-writers the *cestuy que use*, had the beneficial property of the lands, had a right to the profits, and a right to call upon the feoffee to convey the estate to him, and to defend it against strangers. This right at first depended on the conscience of the feoffee: if he withheld the profits from the *cestuy que use*, or refused to convey the estate as he directed, the *cestuy que use* was without remedy. To redress this grievance, the writ of subpoena was devised, or rather adopted from the common-law courts, by the court of chancery, to oblige the feoffee to attend in court, and disclose his trust, and then the court compelled him to execute it. Thus uses were established.—They were not considered as issuing out of, or annexed to the land, as a rent, a condition, or a

right of common; but as a trust reposed in the feoffee, that he should dispose of the lands, at the discretion of the *cestuy que use*, permit him to receive the rents, and, in all other respects, to have the beneficial property of the lands. Yet an use, though considered to be neither issuing out of, or annexed to the land, was considered to be collateral to it, or rather as collateral to the possession of the feoffees in it, and of those claiming that possession under them. Hence the disseisor, abator, or intruder of the feoffee, or the tenant in dower, or by the courtesy of a feoffee, or the lord entering upon the possession by escheat, were not seised to an use, though the estates in their hands were subject to rents, commons and conditions. They were considered as coming in by a paramount and extraneous title; or, as it is called in the law, *in the post*, in contradistinction from those who, claiming under the feoffee, were said to be *in the per*. Thus, between the feoffee and *cestuy que use*, there was a confidence in the person and privity in estate. (See Chudleigh's case, 1 Rep. 190. and Burgess and Wheate, 1 Bla. 123.) But this was only between the feoffee and *cestuy que use*. To all other persons the feoffee was as much the real owner of the fee, as if he did not hold it to the use of another. He performed the feudal duties; his wife was entitled to dower; his infant heir was in wardship to the lord; and, upon his attainder, the estate was forfeited. To remedy these inconveniences, the statute of 27 H. 8. was passed, by which the possession was divested, out of the persons seised to the use, and transferred to the *cestuy que use*. For, by that statute, it is enacted, that, "when any person shall be seised of any lands to the use, confidence, or trust of any other person or persons, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, will, or otherwise: then, and in every such case, the persons having the use, confidence, or trust, should from thenceforth be deemed and adjudged in lawful seisin, estate, and possession of and in the lands, in the same quality, manner, and form, as they had before in the use."

III. There seems to be little doubt, that the intention of the legislature, in passing this act, was utterly to annihilate the existence of uses, considered as distinct from the possession. But they have been preserved under the appellation of TRUSTS. The courts hesitated much before they allowed them under this new name. On the one hand, it had clearly been the intent of the legislature to destroy them, while they continued uses at the common law; on the other hand, motives of equity, or rather of compassion, and the general bent of the nation, pleaded strongly in their favour. The latter prevailed. Thus, to use the expression of lord Hardwicke, 1 Atk. 591, a statute, made upon great consideration, and introduced in a solemn and pompous manner, has had no other effect than to add, at most, three words to a conveyance. Besides this,—one of the chief inconveniences produced by trusts, was, the secret method they afforded for the transfer of property.—The statute intended to restore the notoriety of the old common-law conveyances. So far from effecting it, the existence and transfer of fiduciary or trust estates has continued. Secret modes of transferring the possession itself have been discovered, and have totally superseded that notorious and public mode of transferring property, which the common law required, and the statute intended to restore; and many modifications or limitations of real property have been introduced in consequence of the statute of Uses, which the common law did not admit. An attempt will be made to give the reader a succinct view of these points, by some observations: First, on the nature of the estates of the feoffee and the *cestuy que use*, since the statute of Uses: Secondly, on the limitations and modifications of landed property unknown to the common law, which have been introduced under the statute of Uses: Thirdly, on the mode by which conveyances to uses operate: Fourthly, on the doctrine of powers deriving their effect from the statute of Uses: Fifthly, on uses not executed by the statute. It is to be premised, that what is here said of a feoffee to uses, is equally to be understood of a releasee, conusee, or recoveror, who stands seised to uses.

IV. AS TO THE ESTATES OF THE FEOFFEE AND THE CESTUY QUE USE;—the statute unites the possession to the use, so that the very instant the use is raised, the possession is joined to it; and the use and the possession are thereupon immediately consolidated, and become convertible terms. Thus, had all uses been vested either in possession or in right, no estate or interest of any kind could have been left in the feoffee. But, uses are frequently limited in contingency, to serve which, as they come *in case*, it is necessary that there should be a seisin somewhere. When this case was first considered by the lawyers, it was found difficult to discover any mode of reasoning, consistent with the system generally received on the doctrine of Uses, by which that seisin could be supposed to exist any where; or what the precise nature of it was. This was the great difficulty in Chudleigh's case. There, the following case was put: Suppose a feoffment is made to the use of *A.* during his life, remainder to the use of his sons successively in tail, and, for want of such issue, to the use of *B.* in fee; is there any, and what seisin, to serve the uses limited to the sons of *A.*?—In whom, does that seisin exist?—and how does it operate? Upon this point the judges seem,

by the accounts which have come to us of that case, particularly Sir Edward Coke's and lord chief justice Popham's, to have held very different opinions. All agreed, that, to the execution of an use under the statute, it was indispensably necessary, that there should be a person seised to the use; an use in possession, reversion, or remainder; and a cestuy que use *in esse*. From these positions, some of the judges in that case inferred, that the whole use was executed in *A.* and *B.* in a manner that left *nothing* of the ancient seisin in the feoffees; and that the contingent use, when it came *in esse*, was executed out of the first livery, and the original estate of the feoffees. Others held, that an *actual estate* in remainder was vested in the feoffees, to serve the contingent uses as they arose. But both these systems were found to be open to unanswerable objections. For, with respect to the first, one of the requisites indispensably necessary to the execution of an use, under the statute, is, that there must be a person seised to the use, at the time of the execution of it. Now, if the whole original seisin was divested out of the feoffees, there would not, when the son of *A.* was born, be any person seised to his use;—or, in other words, there could be no seisin to that use. This, would make the estates limited to the sons of *A.* and all other contingent remainders, void in their creation, for want of a seisin to feed them, when they come *in esse*. With respect to the latter system,—it is to be observed, that, under the limitations upon which the case arose, *A.* took an estate for life in possession, and *B.* took an estate in remainder in fee;—and that previously to the birth of *A.*'s children, there was no use vested in any person, which separated those two estates. Those uses, therefore, were commensurate to the whole fee, and admitted no opening for any intermediate vested use. Besides, the feoffor neither limited, nor intended to limit, any such intermediate use to the feoffees. Thus, on the one hand, the objection to the supposition, that nothing of the old seisin remained in the feoffees, on the other, the objection to the supposition, that any use or legal estate remained in them, made it difficult to conceive what estate or seisin could be in them, to serve the contingent use. To clear up this difficulty it was observed, that the possession was not executed by the statute, but in the manner, and to the extent, in which the use was limited. Now, in the case we have mentioned, the use was limited, and consequently the possession executed, to *A.* during his life, remainder to *B.* in fee, but subject to the *possibility* of *A.*'s having sons, and their becoming entitled to the use, and consequently to the possession, for an estate or estates in tail. Thus, during the suspense of the contingent use, the feoffees had a possibility of possession, untouched and unaffected by the statute, as there was no use *in esse* to which it could be executed. The moment the use came *in esse* the feoffees would be entitled at common law to the possession, to the use, or, as we should now call it, in trust for the *cestuy que use*; but by the operation of the statute, the possession is instantaneously divested from the feoffees, and executed in the *cestuy que use*. Thus, by supposing a possibility of seisin, but no actual seisin or use to remain in the feoffees during the suspense of the contingent use, a sufficient seisin is provided to serve the contingent use when it comes *in esse*, without interfering with, or breaking in upon, the legal fee. This intricate subject has been elaborately discussed by Mr. Sanders, in his *Essay on Uses and Trusts*; by Mr. Sugden in his *Practical Treatise of Powers*; and by Mr. Rowe in his *Scintilla Juris*. A short, but masterly view of it, is also given by Lord Chief Baron Gilbert, in his *Law of Uses and Trusts*. An attempt to explain it, may be found, in the note in page 291. of the sixth edition of Mr. Fearne's *Essay on Contingent Remainders*.

V. With respect to the LIMITATIONS AND MODIFICATIONS OF LANDED PROPERTY, UNKNOWN TO THE COMMON LAW, WHICH HAVE BEEN INTRODUCED UNDER THE STATUTE OF USES; the principal of these are known by the general appellation of springing or secondary uses. No estate could be limited upon or after a fee, though it were a base or a qualified fee; nor could a fee or estate of freehold be made to cease as to one person, and to vest in another, by any common-law conveyance. But, there are instances where, even by the common law, these secondary estates seem to have been allowed, when limited, or rather when declared, by way of use. See Jenk. Cent. 8. case 52. After the statute of Uses, the judges seem to have long hesitated whether they should receive them. In Chudleigh's case it was strongly contended, that it would be wrong to make "any estate of freehold and inheritance lawfully vested, to cease as to one, and to vest in others against the rule of law, and that no estates should be raised by way of use but those which could be raised by livery of seisin at the common law." The courts, however, admitted them. After they were admitted, it was found necessary to circumscribe them within certain bounds; because, when an estate in fee simple is first limited, there is no method by which the first taker can bar, or destroy the secondary estate, as it is not affected either by a fine or common recovery. It is now settled, that when an estate in fee simple is limited, a subsequent estate may be limited upon it, if the event upon which it is to take place be such that if it do happen it must necessarily happen within the compass of one or more life or lives in being, and 21 years

and some months over. It was long before the courts agreed upon this period. In *Buckworth and Thirkell*, 1 Collect. Jurid. 332. Lord Mansfield mentioned that it was not settled till his time. It is observed in note 5. to p. 20 a. "that this period was not arbitrarily prescribed by our courts of justice with respect to the limitation of personal estates, but wisely and reasonably adopted in analogy to the cases of freehold and inheritance, which cannot be limited by way of remainder, so as to postpone a complete bar of the entail, by fine or recovery, for a larger space." The same analogy has been observed with respect to these secondary fees, when limited upon an estate in fee simple. But the reason which induced the courts to adopt this analogy, with respect to these estates when limited upon an estate in fee simple, does not hold when they are limited upon or after an estate in tail; because when they are limited upon or after an estate in tail, the tenant in tail, by suffering a common recovery before the event takes place, bars or defeats the secondary estate, and acquires the fee simple absolutely discharged from it. See *Page v. Haywood*, 2 Salk. 570. *Goodiar v. Clarke*, 1 Sid. 102. 1 Lev. 35. Hence, if the secondary estates we are speaking of, are limited upon or after an estate in tail, they may be limited generally, without restraining or confining the event or contingency upon which they are to take place, to any period. Thus, if an estate be limited to *A.* and his heirs; and if *B.* (a person in case) dies, without leaving any child of his body living at the time of his decease; or, leaving one or more such child or children, if such child or all such children shall die before any of them attain the age of 21 years, then to *C.* and his heirs; here, the limitation to *C.* is limited after a previous limitation in fee simple; and it is a good limitation, because the event upon which it is to take place, must, if it do take place, necessarily take place within the period of a life in being, and 21 years and a few months. But, if the estate were limited to *A.* and his heirs; and after the decease of *B.* and a total failure of heirs or heirs male of the body of *B.* to *C.* and his heirs; here, as the secondary use is limited after a previous limitation in fee simple, and the event on which the fee limited to *C.* is to take place, is not such as must necessarily happen within the period we are speaking of, (for *B.* may have issue, and that issue not fail till many years after the expiration of 21 years after *B.*'s decease,) the limitation to *C.* and his heirs is void. On the other hand, if the estates were limited to *A.* for life, then to trustees and their heirs during his life for preserving contingent remainders; then to *A.*'s first and other sons successively in tail male; with several remainders over; with a proviso, that if *B.* dies, and there should be a total failure of heirs or heirs male of his body, the uses limited to *A.* and his sons, and the remainders over, should determine, and the lands remain and go over to *C.* and his heirs; here, the limitation to *C.* and his heirs is limited so as to depend on previous limitations for life, or in tail; and the event, upon which it is so to take effect, may possibly not happen till after a period of one or more life or lives in being, and 21 years. But so far as it is limited on an event which may happen during the continuance either of one or more life or lives in being, it is within the bounds we have mentioned; and so far as it is limited upon an event which may happen during the continuance of the estate of the tenants in tail, or after them, the first tenant in tail in possession by suffering a recovery, before the event happens, may bar the limitations over, and thereby acquire an estate in fee simple; and therefore the limitation over to *C.* and his heirs is good.

It sometimes happens, that, between the estate of the tenant for life, and the remainders in tail, to his issue, a term for years is limited to trustees, in trust to raise sums of money, for portions for children, or for other purposes. As a term for years, thus interposed, precedes the estates tail, it is not subject to the operation of a recovery suffered by any tenant in tail under them. Now, it may be considered that the trusts of such a term are subject to the same observation. In declaring trusts of money to be raised under such a term, it is, therefore, advisable not to protract the vesting of the money beyond the boundary prescribed by the law for the suspense of personal estate. See *Lord Southampton v. Marquis of Hertford*, 2 Ves. and Beames, 54. Thus, where it is intended to limit lands to the issue male of the marriage, in strict settlement, and to provide portions for daughters, on the failure of the issue male, it is advisable to limit, for that purpose, a term for years in remainder immediately expectant on the failure of the issue male entitled or inheritable under the limitations. In this case, the portions may be properly directed to be raised, in the event of there being a general failure of issue male of the marriage; for, as the term is subject to the recovery of any preceding tenant in tail, the trusts of it will be equally subject to his recovery. But, if the portions are provided under a term preceding the estates tail, such a trust would exceed the boundary prescribed by law for such trusts, and would, on that account, be void. In such a case, therefore, the portions of the daughters should be made raiseable on the event of there being no son of the marriage, who should attain the age of 21 years, or, who should

die under that age, leaving issue male of his body, living at the time of his decease, or born in due time after.

VI. With respect to THE MODE, BY WHICH CONVEYANCES TO USES OPERATE.—It is to be observed, that to raise an use under the statute, the possession or seisin to serve the use must be in some person distinct from the *cestuy que use*; as the statute requires that the person seised to the use, and the person to whom the use is limited, should be different persons; so that, if the possession is conveyed, and the use limited to the same person, at least if the use is limited in fee-simple, that is not a use executed by the statute, but the party is in by the common law. For the statute of Uses mentions those cases only, where “any person or persons stand seised to the use of any other person or persons.” Thus, in the case of *Jenkins v. Young*, Cro. Car. 231. 245. lands were given to two, *habendum* to the use of them and the heirs of their two bodies: It was argued, that the estate out of which the use should rise, was but for their lives, and that therefore, on the death of the *cestuys que vie*, the use limited upon their estate was determined: but the court held, that, where an estate is limited to one, and the use to a stranger, the use should not be more than the estate, out of which it was derived; but that, when the limitation is to two, *habendum* to the use of them and the heirs of their bodies, it was no limitation of the use, nor was the use to be executed by the statute. So in *Gilb. Rep.* p. 17. it is expressly said, that if a fine be levied to a man and his heirs, to the use of him and his heirs, he shall take by the common law, and not by way of use. And see *Dyer*, 186. and *Ant.* 22 b. and *Bac. Uses*, ed. 1785, p. 63. *Com.* 313. *Skin.* 209. On this ground, it has been contended, that, if lands are conveyed to *A.* and his heirs, to such uses as *A.* shall appoint; and, in default of appointment, to the use of himself, his heirs and assigns, the power of appointment is void; but that, if lands are conveyed to *B.* and his heirs, to such uses as *A.* shall appoint, and, in default of appointment, to the use of *A.* his heirs and assigns, the power of appointment is good.

In all limitations of uses now, the possession or seisin on which the use is declared, must either remain in the party, or be transferred to some third person. This is the meaning of those passages in the books, where it is said, that uses are raised *either by transmutation of the possession, or without such transmutation*. A bargain and sale, and a covenant to stand seised, operate on the possession of the bargainor or covenantor. A feoffment, fine, and common recovery, operate on the possession of the feoffee, conusee, or recoveror. A lease and release has a mixt operation; the lease having the operation of, and being in fact, a bargain and sale under the statute, and the estate of the releasee being extended or enlarged to an estate of inheritance by the operation of the release at the common law.

VI. 1. For with respect to a *bargain and sale, and a covenant to stand seised*; a bargain and sale is considered as a real contract, whereby the bargainor for some pecuniary consideration bargains and sells, and contracts to convey the lands to the bargainee. A *covenant to stand seised to uses*, is where a man covenants to stand seised of them to the use of his wife, his child, or kinsman. But it is to be observed, that the words bargain and sell, are not appropriated to the former, nor the words covenant to stand seised, appropriated to the latter of these conveyances. If a person for a pecuniary consideration covenants to stand seised to the use of the purchaser, it is a bargain and sale, and if enrolled, is valid and effectual, as a bargain and sale under the statute of Uses, to convey the estate to the purchaser. In the same manner, if a person for natural love and affection bargains and sells his lands to the use of his wife, it is a covenant to stand seised, and as such without enrolment, vests the estate in the wife. 7 Rep. 40 b. 2 Inst. 672. 1 Leo. 25. 1 Vent. 137. 1 Mod. 175. 2 Lev. 10. In the case of a bargain and sale, the bargainor stands seised to the use of the bargainee; in the case of a covenant to stand seised the covenantor stands seised to the use of the parties intended to be benefited. In both, the possession or seisin remains in the party; and the statute draws it from them, and executes it in the *cestuys que use*.

VI. 2. With respect to a *feoffment, fine, and common recovery*; the transfer or transmutation of the possession from the feoffor, conusor, and recoveror to the feoffee, conusee, or recoveror, is effected solely by the operation of these conveyances or assurances at the common law; and if the use is declared to the feoffee, conusee, or recoveror, in fee simple, the conveyance is completed at the common law, in the same manner as if the statute of Uses had never passed. It is only when the use is declared to a third person, that the statute has any operation; and then, by the operation of the statute, the possession previously transferred or transmuted to the feoffee, conusee, or recoveror, by the operation of the feoffment, fine, and common recovery, at the common law, is divested from the feoffee, conusee, or recoveror, and vested in the *cestuys que use* by the statute.

As to the conveyance by *lease and release*: The form of that conveyance is originally derived to us from the common law, and it is necessary to distinguish in what respect it ope-

rates as a common-law conveyance, and in what it operates under the statute of Uses. At the common law, where the usual mode of conveyance was by feoffment with livery of seisin, if there was a tenant in possession, so that livery could not be made, the reversion was granted, and the tenant attorned to the reversioner. As by this mode the reversion or remainder of an estate might be conveyed without livery, when it depended on an estate previously existing, it was natural to proceed one step farther, and to create a particular estate for the express and sole purpose of conveying the reversion; and then, by a surrender or release, either of the particular estate to the reversioner, or of the reversion to the particular tenant, the whole fee vested in the surrenderee or releasee. It was afterwards observed, that there was no necessity to grant the reversion to a stranger; and that if a particular estate was made to the person to whom it was proposed to convey the fee, the reversion might be immediately released to him; which release, operating by way of enlargement, would give the releasee the fee. In all these cases, the particular estate was only an estate for years; for at the common law, the ceremony of livery of seisin is as necessary to create an estate of freehold, as it is to create an estate of inheritance. Still an actual entry would be necessary on the part of the particular tenant; for, without actual possession, the lessee is not capable of a release, operating by way of enlargement. But this necessity of entry for the purpose of obtaining the possession, was superseded, or made unnecessary, by the statute of Uses: for, by that statute, the possession was immediately transferred to the *cestui que use*; so that a bargainee under that statute is as much in possession, and as capable of a release before or without entry, as a lessee is at the common law after entry. All, therefore, that remained to be done, to avoid, on the one hand, the necessity of livery of seisin from the grantor, and, on the other, the necessity of an actual entry on the part of the grantee, was, that the particular estate (which, for the reasons above mentioned, should be an estate for years) should be so framed, as to be a bargain and sale within the statute. Originally it was made in such a manner as to be both a lease at the common law, and a bargain and sale under the statute. But as it is held, that where conveyances may operate both by the common law and statute, they shall be considered to operate by the common law, unless the intention of the parties appears to the contrary, it became the practice to insert among the operative words, the words *bargain and sale*. (in fact, it is more accurate to insert no other operative words), and to express that the bargain and sale or lease is made to the intent and purpose, that thereby, and by the statute of Uses, the lessee may be capable of a release. The bargain and sale, therefore, or the lease for a year, as it is generally called, operates, and the bargainee is in the possession, by the statute. The release operates by enlarging the estate or possession of the bargainee to a fee: this is at the common law, and if the use be declared to the release in fee-simple, it continues an estate at the common law; but if the use is declared to a third person, the statute again intervenes, and annexes or transfers the possession of the releasee to the use of the person to whom the use is declared. It has been said, that the possession of the bargainee, under the lease, is not so properly merged in, as enlarged by the release: but, in all events, it does not, after the release, exist distinct from the estate passed by the release. As the operation of a lease and release depends upon the lease, or bargain and sale, the grantor must be a person capable, at law, of being seised to an use, otherwise the release will be void for want of possession in the releasee. By some very respectable authorities it has been said that a corporation cannot be seised to an use. Pop. 72. 1 Co. Rep. 127 a. Bacon Stat. of Uses, 357. Plo. 102. 538. Jenk. Cent. 195. 2 Ves. 399. Gilb. Uses, 5. 170. 235. Shep. Touchs. 508. A contrary doctrine, so far as relates to the conveyances of corporations by bargain and sale, seems to be laid down in Sir Tho. Holland v. Bonis. 1 Leo. 183. 2 Leo. 121. 3 Leo. 175. And see 13 H. 7. fol. 9. pl. 5. To avoid doubt upon this subject, it seems advisable that corporations should convey by feoffment, or by a lease and release, with an actual entry by the lessee, previous to the release; after which the release will pass the reversion. It may also be observed, that, in *exchanges*, if one of the parties die before the exchange is executed by entry, the exchange is void. Ant. 50 b. But if the exchange be made by lease and release, this inconvenience is prevented, as the statute executes the possession without entry, and all incidents annexed to an exchange, at common law, will be preserved.—By a temporary Irish statute of 9 Geo. II. ch. 3. § 6, the recital of a lease for a year in a release, is made, in all cases, sufficient evidence of it. By the 1 Geo. III. c. 3. that statute was made perpetual, and profert of the release declared sufficient in pleading.

VII. The next consideration is, upon the doctrine of **POWERS DERIVING THEIR EFFECT FROM THE STATUTE OF USES**; but the nature of these notes requires, that what is said on this head should be confined to some general observations upon the mode, by which such powers operate; and the relation, which the deeds by which they are executed, bear to the deeds, by which they are created; and Uses of Rents.

VII. 1. *As to the mode in which they operate.*—All powers of this kind are, in fact, powers of revocation and appoint—very declaration of an use may, in some re-

spect, be considered as an appointment of the use or uses to which the feoffee is to stand seised: but the word appointment is generally applied to those cases, where, either the power of appointment is first reserved, or given, with a subsequent limitation of uses, to take place until, and in default of the appointment; or, where the uses are first limited, and a power is afterwards given to some person to limit other uses. As the uses limited under powers cannot operate, but by the postponing, abridging, or defeating the prior uses, it is usual, in some cases, to precede the power of appointment by a power of revocation. But this is immaterial. The powers of leasing, jointuring, charging, selling, and exchanging, usually inserted in marriage settlements, are powers of revocation and appointment. All of them postpone, abridge, or defeat, in a greater or less degree, the previous uses and estates, and appoint new uses in their stead. As soon as the uses created by them spring up, they draw to them the estate of the feoffee: and the statute executes the possession. But it must be observed, that these powers do not operate as a conveyance of the possession of the estate, but as a limitation of the use. Hence, if a person, having a power of appointment, appoints the estate to *A.* and his heirs, to the use of *B.* and his heirs, the use is executed in *A.* and his heirs, and *B.* takes only an equitable fee. Thus, suppose a marriage settlement framed in the usual manner, and with the usual power of selling and exchanging reserved to the feoffees; in these cases, it is sometimes expressed, that it shall be lawful for the feoffees to grant, bargain, sell, and convey. But, whatever are the words made use of, they can only operate as a limitation of the use; and the vendee will take the legal estate. If the feoffees make a conveyance by lease and release, there is no doubt but it will be effectual; it will operate, however, as an appointment; the releasee will take the legal estate, and if the release is made to uses, the intended *cestuys que use* will have only equitable estates. To explain this more fully, it is to be observed, that those uses which are not vested either in possession or right, immediately on the execution of the deed, are termed future uses, and are said to arise, either by the act of God, or the act of the party. Mr. Booth, in his printed opinion, at the end of Mr. Hillyard's edition of Sheppard's Touchstone, gives an explanation of this distinction, which, if his expressions are understood in the sense, in which it is evident he intended using them, will be found perspicuous and exact. "It is wholly immaterial," he says, "how, or by what means, the future use comes *in esse*, whether by means of some event provided for, in case it happened, in the creation of the uses, which event may be called the act of God; or, by means of some work performed by any certain person, for which provision was likewise made, in the creation of the uses, which may be called the act of man. In either case, the statute operates the same way; for the instant the future use comes *in esse*, either by the act of God, or by the act of man, the statute executes the possession to the use, and the *cestuy que use* is deemed to have the same estate in the lands as is marked out in the use, by the deed that created it. When the use arises from an event provided for by the deed, it is called a future, a contingent, an executory use; when it arises from the act of some agent or person nominated in the deed, it is called a use arising from the execution of a power. In truth, both are future or contingent uses, till the act is done; and afterwards they are, by the operation of the statute, actual estates. But till done, they are in suspense, the one depending on the will of Heaven whether the event shall happen or not, the other on the will of man. Whilst these last are in suspense, they are called powers." According to this explanation, the uses raised by limitations to first and other sons, or to such first or only son who shall attain twenty-one, or to the survivor of *A.* and *B.*, or to the right heirs of *I. S.*—a person then in existence,—or to *C.* if *A.* dies in the life-time of *B.* &c. &c. are all uses arising by the act of God; as they are events, designated by the original deed, but which though designated by the party, depend for their effect, on the will of Providence. On the other hand, where there are limitations to such uses as *A.* shall appoint, or to such of the children of *A.*, as *A.* shall appoint; or, where a power is given to *A.* to jointure, to charge with portions, to mortgage, to lease, to sell, or to exchange;—in all these cases, the persons, and the estates and interests are to be designated by the party. He designates the persons, the children, the mortgagee, the lessee, the vendee, and exchanges. These, therefore, are said to arise by the act of the party. From this explanation it is evident, that there is no material difference in the quality of the uses; the difference is in the act, which produces them. In the latter case, the party has the power of raising them, and it is in that sense, that the word power is used in this place. Now, if an estate is conveyed to *A.* and his heirs, to the use of *B.* for life, remainder to his first and other sons, successively in tail male; upon the birth of the first son, the possession is executed in him by the statute. Suppose the estate were conveyed to *A.* and his heirs, to the use of *B.* for life, remainder to such uses generally, or to such son of *B.* as *B.* shall appoint, and *B.* appoints to the use of his first son. Immediately upon the appointment, the use is executed in the son. Then how does this appointment operate? Clearly not as a conveyance. For *B.* had only a life estate, and consequently could not convey an estate-tail, to his own son; it operates there-

fore as a designation of the person to take the use: *B.*'s right to make this designation is termed a power of appointment, the exercise of it is termed an appointment, the person taking under it is termed the appointee. This may be made more clear, by considering how it would have stood on a limitation of uses at common law, before the statute of Uses. Till that statute, a conveyance to *A.* and his heirs, to the use of *B.* for life, with remainder to such uses, or to such of his sons, as he should appoint, was tantamount to what now is a conveyance unto and to the use of *A.* and his heirs, in trust for *B.* for life, remainder in trust for such persons, or for such of his sons, as he shall appoint. When, at common law, an appointment was made, to the use of the first son, the trustee stood seised at common law, to the use, or, as we should now call it, in trust, for that first son; he thereupon became the *cestuy que trust*. Since the statute has executed the use, where the son takes under an appointment of this nature, the use is executed in him, and he is the *cestuy que use*. Thus, at the common law, an appointment operated to substitute one *cestuy que trust* in the room of another. Since the statute, an appointment operates to substitute one *cestuy que use* in the room of another. The conclusion is, that, wherever a party, having a legal estate, conveys it to a person and his heirs, to such uses as that person or any other person shall appoint, and an appointment is made, it operates not as a conveyance of the land, but as an appointment of the use, and consequently the appointee takes the use or legal estate. Therefore, as has been observed before, if a person having a power of appointment, appoints to *A.* and his heirs, to the use of *B.* and his heirs, the legal estate is in *A.* In the same manner, if a person having a power of selling and exchanging, conveys the estate to *A.* and his heirs, to the use of *B.* and his heirs, the legal estate is equally in *A.* by the exercise of the power.

VII. 2. *As to the relation, which deeds, by which powers are executed, bear to the deeds, by which the powers were created.*—It is generally true, that the use created under the power takes effect in the same manner, as if, in the deed containing the power, it had been inserted instead of the power: thus, suppose an estate conveyed to the use of *A.* for life, remainder to such uses as *B.* should appoint, and in default of appointment, to the use of *B.* and his heirs; *B.* appoints the estate to *C.* for life: remainder to his first and other sons in tail male. After this appointment is made, it is the same as if the estate had been originally limited to the use of *A.* for life, remainder to the use of *C.* for life; remainder to *C.*'s first and other sons in tail male; remainder to *B.* and his heirs. So, if the estate is limited to *A.* for life; remainder to the use of his first and other sons in tail male, with power to *A.* to appoint a rent charge to his wife, with usual remedies and a term of years for securing the same, and to charge the estate with portions, and to create a term of years for securing the same, and he exercises these powers; it is the same, as if, in the original settlement, the estate had been limited to use of *A.* for life, remainder to the use and intent that the wife might receive her jointure and distrain, and enter upon and take possession of the estate, in case the same should be in arrear; and, subject thereto, to the use of trustees for a term of years for further securing the rent charge; remainder to the use that the lands in question may be charged with portions, and subject thereto, to the use of trustees for a term of years for raising the portions; remainder to *A.*'s first and other sons successively in tail male. The relation therefore which the deed by which the power of appointment is executed, as to the deed by which the power is created, holds so far as the use thus appointed derives its effect from, and is served by or out of, the original seisin of the donee, recoveror, feoffee, or releasee: and as it precedes and takes place of all the uses limited subsequent or subject to the power. In this sense it, clearly has a relation to the deed by which it is raised. But it has no other relation in point of time. In the case of the Duke of Marlborough v. Lord Godolphin, 2 Ves. 61, Lord Sunderland left the interest of 30,000*l.* to his wife for her life, and the principal, after her decease, to such of her children as she should by deed or will appoint. By her will she appointed 2,000*l.* to Mr. Spencer, and 1,500*l.* to Lady Morpeth, who both died in her life-time. It was contended that the appointment related back to the time of Lord Sunderland's will, which relation would over-reach the death of the two parties, who were alive at the time of the death of the testator, Lord Sunderland; and then it would be considered as vesting in them in their lives. But Lord Hardwicke denied this. He admitted that an use taking effect by virtue of an execution of a power, was taken under the authority of that power, but *not from the time of its creation*; and he exemplifies this distinction by appointment of uses; in which case, says his lordship, if a feoffment is executed to such uses as the feoffor shall appoint by will; when the will is made, it is clear the appointee is in by the feoffment, but has nothing from the time of the execution of the feoffment, so as to vest the estate in him; and he thereupon decreed these legacies to have lapsed by the death of the legatees in the life-time of the testator. This shows how much it is necessary to qualify the general expression above alluded to. It also reconciles them with a known circumstance attending powers of this nature, with which it is otherwise difficult to reconcile them, viz. that by an execution of a general

power, a person may limit estates which he could not limit by the deed in which the power is contained. By a general power of appointment is understood that kind of power, which enables the party to appoint the estate to any person he thinks proper; and, in this sense, it is opposed to a qualified or particular power, which enables the party to appoint to or among particular objects only; as a power of appointing to his children, or the children of any other person. The former has been termed a Power of Ownership,—the latter, a Power of Selection. A general power of appointment has no tendency to a perpetuity, as from its very nature, it enables the party to vest the whole fee in himself, or in any other person, and to liberate the estate entirely, from every species of limitation, inconsistent with that fee. In fact therefore giving a person such a power, is nearly the same as giving him the absolute fee. The only difference is, that it enables him to do, through the medium of a seisin previously created, that which, if the fee had been actually limited to him, he might do by a conveyance of the land itself; so that in both cases his power of alienation is of the same extent. But in the case of a particular or qualified power, where the objects are limited, the case is entirely different. The limitation of the object takes the land out of commerce, and of course has a tendency to that perpetuity, which the English law of real property does not admit. The consequence therefore is, and by a series of cases it now appears to be settled, that where the power is general, estates for life, with remainders over, to their issue in strict settlement, may be limited under them to persons not *in case* at the time of the execution of the original deed, in the same manner, and to the same extent, as if instead of being derived out of the seisin of the feoffees of the original deed, and in that point of view, as making a part of that deed, the uses and estates so limited were created by an original, substantive, independent, and integral conveyance. On the other hand, in the case of a particular or qualified power, that is, where the objects are qualified, as a power of appointing to the children of the party himself, though perhaps it may enable him to appoint life estates, to children unborn at the date of the deed creating the power; yet, if it enables him to appoint life estates to those children, it certainly does not authorize him to extend the appointment to the children of these children, so as to make them take by purchase, nor to appoint any other estate, which might not have been created by the very deed creating the power. In all cases therefore of particular or qualified powers, both in the creation and the exercise of them, care should be taken to ascertain, that the uses which the party is empowered to raise under them, or actually assumes to raise under them, when he comes to exercise the power, are such as the deed creating the power might itself have raised.

It may, however, be proper to add, that between deeds and wills there is this material distinction: a deed takes effect immediately on the execution of it;—a will is ambulatory, and waits for its effect till the testator's decease. In inquiring therefore into the legality of the limitations we are speaking of, the reference in the case of a deed, should be to the time of its execution; but the reference in the case of a will, should be to the death of the party. If, therefore, in a deed exercising such particular power of appointment, there is a limitation for life to a person unborn at the date of the deed creating the power, with remainders over to his sons in strict settlement, these remainders over will be void, and will not be helped though a son is born on the following day. In the case of a will it is different. If the son is born in the party's life, he is capable of a limitation to himself for life, with remainders over to his sons in strict settlement.

In cases of this nature, there is another material distinction between deeds and wills. In deeds, technical expressions are, in some cases, absolutely necessary, so that they cannot be supplied by others, however forcible or clear; in other cases they have a determinate sense appropriated to them by law, in which, and in no other, the law permits them to be construed. In wills there is a greater latitude of construction: technical expressions are never necessary, and every expression is construed in the sense, in which the testator appears to have designed to use it, so that, when his intention is once discovered, whether he uses technical language or not, and if he uses it, whether he uses it in a proper or an improper sense, his will is construed solely with a view to what appears to be his obvious meaning, and not according to the rigid or technical import of his expressions. Another rule in the construction of wills, which is admitted in a much greater latitude than it is in the construction of deeds, is, that when a testator's general intent appears, the court, in order to give it effect, will sacrifice to it a particular intention inconsistent with it. Now, in the cases of which we are speaking, where the limitations are construed to import a life estate to an unborn son, and successive estates tail by purchase to the sons of that son, there, in a deed, the latter limitations suspend the inheritance from vesting beyond the period allowed for its suspension by the rules of law, and are therefore void. But, in the case of wills, the law will not construe these expressions thus rigidly. From the manifest tenor of the devises we are speaking of, it must appear to be the intention of the party that, all the issue, (male or female, as the case may happen) should take the estate. This

is the general intention: besides this, he appears to intend, that they should take the estate in that manner, which, if allowed, must necessarily give estates by purchase to the sons of the unborn son. This is his particular intention; but it cannot be effectuated, being contrary to law. To allow it therefore would subvert his general intention. The court therefore, to give effect, as far as the law admits, to the testator's will, sacrifices the particular to the general intent; and conformably to this principle, as the general intent can only be answered, by giving an estate tail to the unborn son, the court will construe the devise to import an estate tail to him. This construction, by making the sons of the unborn son take by descent, sacrifices the testator's intent that they should take by purchase; but by letting in all the issue, preserves his general intent, that all the issue should take—see *Doe d. Blandford & ux. & Dymock v. Applin*, 4 Term. Rep. 82. *Humberston v. Humberston*, 1 Peere Williams, 332; *Chapman v. Browne*, 3 Burr. 1634; *Nicholl v. Nicholl*, 2 Black. Rep. 1159; *Pitt v. Jackson*, 2 Bro. Ch. Cases, 51; and *Robinson v. Hardcastle*, 2 Term. Rep. 241. To this point the ultimate decree in the great case of *Hopkins v. Hopkins* is very important. As the points in that case involve some of the most interesting doctrines of the law of uses, and the printed account of them is to be found only in separate and detached cases, taken by different reporters, and in different stages of the cause, and as no account has yet appeared in print of the final decree, it was thought the following succinct account of the whole cause would be acceptable to the reader, and would not be considered as misplaced in the present Note.—The case was, that Mr. Hopkins by his will devised his estates to the use of trustees and their heirs, in trust for Samuel Hopkins, (the son of John Hopkins the cousin and heir at law of the testator,) for his life; remainder to his first and other sons successively in tail male; and for want of such issue, “in case his said cousin John Hopkins should have any other son or sons of his body lawfully begotten, then in trust for all and every of such other son and sons respectively and successively, for their respective lives; with the like remainders to their several sons successively and respectively, as are thereinbefore limited to the issue male of the said Samuel Hopkins, son of the said John Hopkins; and for default of such issue, then in trust for the first and every other son of the body of Sarah, the eldest daughter of his said cousin John Hopkins, lawfully to be begotten, successively and according to priority of birth, for their respective lives; with remainders to the heirs male of the body of every such son, respectively and successively, the elder and the heirs male of his body to take before the younger and the heirs of his body issuing; and for want of such issue, then in trust for the first and every other son of the body of Mary, the second daughter of his said cousin John Hopkins, lawfully to be begotten, successively and respectively, according to priority of birth, for their respective lives; with remainders to the heirs male of the bodies of every such son respectively and successively, the elder and the heirs male of his body to take before the younger and the heirs male of his body issuing; and for want of such issue, then in trust for the first and every other son of the body of Elizabeth, the third daughter of his said cousin John Hopkins, lawfully to be begotten, successively and respectively, according to priority of birth, for their respective lives; with the like remainders to the heirs male of the body of every such son, respectively and successively, the elder and the heirs male of his body to take before the younger and the heirs male of his body issuing; and for want of such issue, then in trust for the first and every other son of the body of Hannah, the youngest daughter of his said cousin John Hopkins, lawfully to be begotten, successively and respectively, according to priority of birth, for their respective lives; with the like remainders to the heirs male of the body of every such son respectively and successively, the elder and the heirs male of his body to take before the younger and the heirs male of his body issuing; and in case his said cousin John Hopkins should have any other daughter or daughters lawfully begotten, then in trust for the first and every other daughter, respectively and successively, according to priority of birth, for their respective and successive lives; with the like remainders to their several and respective heirs males successively, the elder and the heirs male of his body to take before the younger and the heirs male of his body issuing; and in default of such issue, then in trust for the first and every other son of his cousin Hannah Dare, the then wife of Francis Dare, and daughter of his uncle Samuel Hopkins, deceased, lawfully begotten or to be begotten, successively and respectively, according to priority of birth, for their respective lives; with the like remainders to the heirs male of the body of every such son respectively and successively, the elder and the heirs male of the body of every such son respectively to take before the younger and the heirs male of his body issuing; and for want of such issue, then in trust for James Bennett, the only son of his cousin Sarah Alloway, then the wife of William Alloway, and another daughter of his said uncle Samuel Hopkins deceased, by Mr. Bennett, her former husband, for his the said James Bennett's life; with remainder to his first and every other son lawfully to be begotten, successively according to priority of birth, and the heirs male

of every such son respectively and successively, the elder and the heirs male of his body to take before the younger and the heirs male of his body issuing; and in default of such issue, then in trust for his own right heirs for ever;" With a proviso, that whoever should come to his estate should take his surname and coat of arms; and a proviso, disposing of the rents during the minorities of the devisees;—And, after giving a great number of legacies, he gave the rest and residue of his personal estate to his executors, in trust that the same should be by them, or the survivors of them, with all convenient speed laid out in the purchase of messuages, lands, and tenements of inheritance in England, to be conveyed to the executors and their heirs, upon the several trusts and for the same purposes as were thereby declared touching the estates he was then seised of, and which he had devised. And the testator appointed Sir Richard Hopkins, John Rudge, and James Hopkins, executors of his will. And after his decease it was proved by Sir Richard and Mr. James Hopkins. Samuel Hopkins, the son of John Hopkins, the testator's cousin, died in the testator's life. After the testator's death, John Hopkins the cousin and heir of the testator, and his four daughters, the said Sarah, Mary, Elizabeth, and Hannah Hopkins, and also Amey Hopkins, another daughter of John Hopkins the cousin, born after making the said will, exhibited a bill in chancery against Sir Richard Hopkins, John Rudge, and James Hopkins, and against John Dare, Francis Dare, and Philip Dare, infants, (children of Hannah Dare) and also against the said James Bennett: stating, amongst other things, the will of Mr. Hopkins; and praying that the executors might account for the testator's personal estate, and the rents and profits of his real estate, and that such of those profits as did not pass by his will, together with the legacy given to John Hopkins the cousin, might be paid to him, and that the residue of the said testator's personal estate, after payment of his debts, legacies, and funeral expenses, might be placed out in proper purchases, according to the directions in the testator's will; and in the mean time be improved at interest. In Hilary term 1732, Sir Richard Hopkins and James Hopkins filed a cross bill against the complainants, to have the trusts of the will carried into execution, and for an account of the real and personal estate of the testator. On the 25th October 1733, by a decree in these causes, by the master of the rolls, it was declared, among other things, that the plaintiff John Hopkins was entitled to the rents and profits of the testator's real estate accrued since his decease, till some person should come in being, that should be entitled to an estate for life, according to the limitations in the said will; and that he was in like manner entitled to the surplus produce of the said testator's personal estate, after payment of the annual sums charged thereon by the said testator's will; and that the residue of the personal estate was to be laid out in the purchase of lands, with the approbation of the master, and settled to the same uses and upon the same trusts as the real estates, devised by the said testator's will, soon settled; and that until such purchase could be found out, the personal estate should be put out at interest upon government or other securities, with the approbation of the master, in the names of Sir Richard Hopkins and James Hopkins, upon the trusts of the will, and the surplus rents and profits of the estates devised to Sir Richard Hopkins and James Hopkins, and the estates to be purchased as aforesaid, and also the surplus produce of the said personal estate, until such purchase was made, was to be paid to John Hopkins, the testator's cousin, until some person should come in being, that should be entitled to an estate for life, according to the limitations of the testator's will. On the 18th November, 1734, the cause came before lord chancellor Talbot upon an appeal; and the decree was affirmed, with the addition that the words "in possession" should be inserted in the decree in two places next after the clause "until some person should come in being, that should be entitled to an estate for life."—The report of this cause in Cas. in Eq. temp. Talbot, 44. reaches the period of the cause. By the decrees made on these parts of it, the two following important points were settled; that during the suspense, which, by the death of Samuel Hopkins in the testator's lifetime, took place during the life of John until he had another son, or until, by his decease without other issue, (if that event had happened,) the possibility of his having another son would have determined, the limitations enured as executory devises; and that, during such suspense, the rents and profits of the real estate being undisposed of by the testator, (his disposition of them having effect only during the minorities of the persons actually entitled,) belonged to the heir at law.—Here the cause was left by Lord Talbot's decree.—In June 1736, John Hopkins had a second son named William, who died in the following December.—Upon this, the eldest son of Hannah Dare having attained 21, and being the first tenant for life *in esse*, brought his bill to have a settlement made by the trustees, in which settlement he insisted to be made immediate tenant for life.—In this stage of the business it was argued, that the estate having become vested in the second son of John Hopkins (the testator's cousin) and by his death without issue, the suspense of there being a future child of John Hopkins being again renewed, the ulterior limitations must operate as contingent remainders, and that as there was no estate to support them, they were absolutely

void, and the heir at law of course entitled to the estate. In answer to this, it was contended, that the subsequent limitations might be supported as so many distinct executory devises; but that, if it was necessary to consider them as contingent remainders, they were good in their original creation, and supported by the legal fee outstanding in the trustees. These points came before Lord Hardwicke in 1738, and his lordship was of opinion, that the preceding freehold being once vested, the ulterior devises thereupon operated as contingent remainders; and having once become such, no subsequent event could make them enure as executory devises; so that they were thenceforth to be considered as contingent remainders; and his lordship was of opinion, that the legal fee in the trustees was sufficient to support them. Mr. Atkyns's report of this case, 1 vol. 581. embraces this stage of it. After this there is no printed account of this important case. From the proceedings of the cause, it appears, that John Hopkins, the cousin of the testator, died without issue male, and without having had any son except Samuel and William.—Sarah Hopkins had one daughter, who died an infant and unmarried; and afterwards Sarah died.—Mary had a son and a daughter, who both died without issue; and afterwards Mary herself died.—Elizabeth, the third daughter, intermarried with Benjamin Bond, esquire, by whom she had issue one son, named Benjamin Bond Hopkins, he having taken upon him the name and arms of Hopkins, in pursuance of the directions for that purpose contained in the testator's will.—Hannah, the fourth daughter, intermarried with William Hallet, esquire, and died, leaving one only child, named Hannah. Amey, the youngest daughter of John Hopkins, the cousin, died an infant, and without issue. John Dare also died, leaving one son, also named John Dare; and Francis Dare also died.—In 1772, Mr. Benjamin Bond Hopkins suffered a recovery of the estates, and declared the use to himself in fee simple. In Michaelmas term in the same year, he filed a supplemental bill in chancery against the trustees of the real and personal estate of the testator John Hopkins, and his heirs at law and devisees in remainder, and prayed thereby that the real estates might be conveyed to him and his heirs. On the 8th July 1774, the cause was heard before Lord Chancellor Bathurst, and his lordship thereupon finally ordered, that the trustees should convey the real estate to Benjamin Bond Hopkins, and his heirs, or as he should appoint.—In the execution of powers, too rigid an adherence to the form prescribed cannot be observed: but it is not necessary that the words, or even the form of the power, should be used, if the material circumstances of the power are pursued, and the party appears to have had the subject of his power in contemplation. By a series of acknowledged authorities it is settled beyond all doubt, first, that, to a valid exercise of a power, a reference to or notice of that power is not necessary, if it sufficiently appears that the party intends exercising it: Secondly, that it is considered as sufficient evidence of the party's intention to exercise the power, if his intention appears to be, to do that act, which his power authorises him to do, but which he is not authorised to do, without resorting to his power. Thus, where tenant for life, with several remainders over in strict settlement, and with a general power of revocation and new appointment, conveys to a purchaser by lease and release, bargain and sale, or feoffment, without noticing his power, it is a valid, but a very informal and improper execution of the power; for the party cannot vest the fee in the purchaser without resorting to his power, it is therefore evident he intends exercising it: and consequently if the formalities prescribed by the power are pursued, it will be considered as a substantial execution of the power. Still it is necessary that it should appear to be the intention of the party to exercise the power; and therefore, generally speaking, it is necessary he should mention the property which is the subject of the power. See Sir Edward Clere's case, 6 Rep. 17 b. 12 Mod. 469. *Guy v. Dornor*, Sir Tho. Raymond, 295. *Snape v. Turton*, 2 Roll. Abr. 263. *Fitzwilliam's case*, Moore, 681. *Kibbett v. Lee*, Hob. 312. *Fitzgerald v. Lord Fauconberge*, Fitzgibbon, 207—215. *Tomlinson v. Dighton*, 1 P. W. 149. *Jenkins v. Kemishe*, Hard. 395. 1 Lev. 150. *Campbell v. Leach*, Amb. 740. *Molton v. Hutchinson*, 1 Atk. 558. and *ex parte George Caswall*, *ibid.* 559.—In all cases, however, where there is an informal execution of a power, it operates in the mode in which the power operates, not in the mode in which the deed, the form of which is used, would operate. If, therefore, a person having a power of appointment, conveys by lease and release, and these can only have effect, as an execution of a power, the conveyance operates as an appointment, and not as a release; and of course, if it is a release to A. and his heirs, to the use of B. and his heirs, the legal estate is vested in A.

In the exercise of powers, conveyancers have introduced two precautions, which are often proper, but certainly sometimes superabundant: one is, to make the party exercising the power, declare, that he acts, not only in exercise of that particular power, but in exercise of every other power, enabling him to do the act in question: the other is, where the party has a special power over land, and is also entitled to the fee, or to any particular estate carved out of it, he is made not only to exercise his power, but also to convey the land as owner of it. Thus, where a person having a power of appointment, intends conveying his

estate to a purchaser, he is made not only to appoint the fee, but to convey it by lease and release. Sometimes the appointment and the release are blended together; but this is very informal, and is always improper, where it is not the intent of the deed that the party should have the legal estate. It may however be contended, that the court would marshal the words, so as to give them all their intended effect; as, where a person having a power, is made to grant, bargain, sell, alien, release, limit, appoint, and confirm the lands to *A.* and his heirs, to the use of *B.* and his heirs; it may be contended, that the court would construe the words *grant, bargain, sell, alien, release, and confirm*, as referrible to *A.* and his heirs, and the words *limit and appoint* as referrible to *B.* and his heirs. See *Cox v. Chamberlain*, 4 Ves. jun. 631. *Roach v. Wadham*, 6 East, 289. One reason for making the party in these cases both convey and appoint, is, that, if the power either was not well created, or is become suspended, and he has himself any estate in the land, the conveyance will operate on his estate.

In some cases, it is necessary both to appoint and convey; as where an estate is limited to *A.* for life, remainder to such uses as he shall appoint; here the appointment would operate only on the reversion expectant on the life estate: a conveyance therefore is necessary to pass the life estate. This observation may serve to correct a mistake which is sometimes made by those who levy fines, with a view to enable them to dispose of their estates, and therefore direct the fine to operate to the use of the party himself during his life, remainder to his wife for life, remainder to such uses as he shall appoint. Here the appointment operates only on the reversion, and consequently, to pass the wife's life estate, a new fine is necessary. To prevent this, the power of appointment, in these cases, should precede the uses. For the same reason, when a settlement is executed of personal estate, which it is intended to subject to the appointment of the husband and wife, or either, with successive life estates to them in default of appointment, the power should precede the trusts conferring these life interests on them.

It may be observed, that, when a person creates a power of appointment, to enable him to dispose of his estate, within a short time after, it is better to vest the legal estate in the trustees, by conveying it unto and to the use of them, and their heirs, upon trust to convey it as the party shall appoint, than to convey it to the trustees and their heirs, to such uses as the party shall appoint; for powers are liable to be suspended and extinguished by very secret acts; of these, from their nature, purchasers must often be ignorant. In these cases, therefore, they often rest, in some measure at least, on the honour of the vendor; but, when the legal estate is vested in the trustees, a conveyance from them will, at all events, give the purchasers the legal estate.

As estates created by powers, and estates created by conveyances, are after their creation the same, the terms expressing the operation of appointments and conveyances, are very often, both in the deeds creating the powers, and the deeds by which they are exercised, confounded. Something of this, was, till lately, generally discernible in the best drawn marriage settlements. Thus, in the power of leasing, the party is authorized to grant, lease, or demise, when, in fact, he can neither grant, lease, or demise for a longer term than his own life; the power therefore does not authorize him to grant, &c. the lands, but to appoint the use of the lands, for the number of years or lives in question: the expression therefore should be, to limit or appoint by way of lease or demise. So, in the power of selling and exchanging, it is often said, that it shall be lawful for the trustees to grant, bargain, sell, release, and confirm the lands; but, in the strict sense of these words, it is impossible for the trustees to grant, bargain, sell, release, or confirm; for the trustees have no actual estate, except their estate for preserving contingent remainders; and therefore, cannot convey the lands for a larger term. The power therefore operating as an appointment of the whole fee, the expression here, as in the former case, should be, *limit and appoint*. As this last power amounts to a total determination of all the subsisting uses, and a creation of an entire new estate of inheritance, it seems advisable to accompany it with a power of revocation. It may therefore be expressed, that it shall be lawful for the trustees to sell and exchange, and, for that purpose, to revoke the uses of the deed, and to appoint new uses; and the more general these powers of revocation and new appointment are expressed, the better, as a mere power to revoke the uses of the estate intended to be sold, and to appoint it to the purchaser, is sometimes found insufficient to answer the object, as where there is an agreement between the vendor and vendee to apportion rents. It is also a consequence of these powers operating by way of appointment, that the use is vested by them in the appointee, and, therefore, when by them the lands are expressed to be conveyed to *A.* and his heirs, to the use of *B.* and his heirs, or to the use of *B.* for life, with remainders over, the whole legal fee is vested in *A.* and the uses declared upon it have effect only as trusts in equity. The appointment therefore should be immediately to the use of the persons intended to take beneficially under the proposed instrument.

It is observable, that powers of leasing, and of selling and exchanging, are generally limited to the persons to whom they are intended to be given, and the survivor of them, and the heirs of the survivor: it is a necessary consequence of this, that, if the power be-

comes vested in the heir of the survivor, and that heir is an infant, the power cannot be exercised during his minority. By the act 7 Ann. c. 19, infant trustees, by the direction of the court of chancery, signified by order upon petition, are empowered to convey estates held by them in trust. But infants cannot convey under a power without an act of parliament. To avoid this inconvenience, it is advisable to limit the power in question to the executors or administrators of the survivor. This observation, however, is confined to the case of powers, and does not extend to the cases of trusts, where the legal estate is vested in trustees; for the trust should always follow the legal estate of the land, when it is conveyed to, and intended to reside in, the trustees. It should consequently be vested in those persons upon whom the lands are intended to devolve. Where therefore lands are conveyed unto and to the use of trustees and their heirs in trust to sell; as the lands necessarily devolve on the survivor, and the heirs and assigns of the survivor, the trust should in like manner be limited to the survivor, his heirs and assigns.

It often happens that the same deed contains several powers; and, supposing all or even more than one of them, to be executed, there is, at least, ground to argue that, generally speaking, the use limited by the power last executed, will take place of all the uses created by the powers previously executed, unless the contrary is expressed or implied in the deed. In Moore, 788. Lord Coke is made to say, that if a tenant for life, with a power of leasing, and a general power of revocation, makes a lease under his power of leasing, he may afterwards revoke all but the leases. It is however to be observed, that when a power is exercised for a valuable consideration, in such a manner as shows it to be the intention and agreement of the parties, that the use created under it should not be over-reached by the execution of another power, it is contrary to equity, that it should be thus over-reached, and, consequently, the unexecuted powers may be so far affected, both at law and in equity, as to be subject to the use created under the executed power. To avoid all disputes upon these heads, it is necessary to express very clearly what uses are, and what uses are not, intended to be over-reached, by the execution of the powers, both as to the uses actually limited by the settlement itself, and as to the uses to be limited under the powers contained in that settlement. In a marriage settlement, the wife and the younger children of the marriage are principal objects. Unless therefore the parties intend the contrary, all the powers of charging with money should be declared to be subject and without prejudice to the provisions made for the wife and younger children. With respect to the other powers, the principal of these are the powers of leasing, and of selling and exchanging. As it is equally for the benefit of the persons entitled in remainder or reversion as of the tenant for life, that the estate should be properly let out upon leases, there is no reason why the estate of the wife, or any other person claiming in remainder or reversion, should be made paramount to the leases. With respect to the powers of selling and exchanging, the jointure of the wife, and the portions of the children, may be transferred to the estates to be acquired under those powers, and to the money arising from the sale of the settled estate, till the new estate is purchased: it is also to be observed, that the sales and exchanges cannot be made without the parents' consent. There seems therefore no reason for exempting any of the uses, except the leases, from the exercise of that power; but, with respect to the leases, these, from their nature, cannot be transferred to the lands to be acquired under the powers, and consequently these should not be subject to the powers of selling and exchanging. The same objection lies, in a certain degree, to powers of raising money by way of mortgage. No person would advance money on mortgages of this nature, if they were to be made subject to the general powers of sale or exchange; and therefore, to prevent all doubt on this head, it should be declared, that the powers of selling and exchanging should be subject to mortgages previously made, unless it shall be with the consent of the mortgagee; and that, in the case of such consent, the lands to be purchased, or taken in exchange, may be mortgaged to them for their security.

It often happens, that powers are given to parties to be exercised by them, when in the actual possession of the estate. In some cases, this is done without advertent sufficiently to the situation and probable wants of the parties. Suppose an estate devised by the husband to his wife for her life, remainder to her son for his life, with remainders over in strict settlement; with powers to the son, when in possession, to jointure and charge with portions. During the mother's life, the son is not in possession, and consequently is not in a situation to exercise those powers. Now, though it may be improper, and contrary to the intention of the parties, that the jointure to be made by the son should charge the mother's estate, during her life, against her consent, there can be no reason why it should not charge the estate with her consent; neither is there any objection to the son's being enabled to exercise the power in her life-time, provided the jointure do not take effect, so as to be payable or to charge the estate, till after her decease. It seems therefore advisable, that, in cases of this nature, the son should be entitled to exercise the powers, with the mother's consent, during her life, or to exercise them, without her consent, subject to her life estate. Sometimes, when the difficulty in question has arisen, it has been attempted to put the party in a situation to exercise the power by accelerating his possession of the estate. In one case this may be thought to answer the object intended; this is, where *A.* is tenant for

life with the immediate remainder, (without any limitation to trustees,) to *B.* for life, with a power to *B.* to jointure when in possession. Here, if *A.* surrenders to *B.* *E.* is, to all purposes, in possession of the estate, and may therefore be considered to be in a situation to exercise his powers. But, where there is an intermediate estate, this never can be relied on. If it is expressed in the deed, as it generally is, that it shall be lawful for the party to exercise the power when in possession under the limitations, and there is a limitation to trustees to preserve the contingent remainders, the first tenant for life can in no wise put the second tenant for life in possession of the estate but by an actual conveyance of his life estate; consequently the party will then be in possession, not by virtue of the limitations of the deed, but by the act of the first tenant for life. For, instead of being tenant in possession for his own life only, as he would be, if he was in possession under the limitations in the deed, he is tenant in possession for the life of another person, with a remainder for his own life; so that he has two estates which are perfectly distinct, and under the limitations of the settlement, he is only tenant for life in remainder. Where these words therefore are inserted, it seems clear the party is not in possession within the words or meaning of the deeds, and consequently not in a situation of exercising his power. Where these words are not inserted, it may be contended that they ought to be implied.

VII. 3. Before we proceed to the last head of this annotation, of the uses not executed by the statute, the following observations are offered on *USES OF RENTS*. These are executed by the statute: so that, were lands are conveyed to *A.* and his heirs, to the use, intent, and purpose, that *B.* or that *B.* and his heirs may receive a rent, the rent is executed. When therefore lands are conveyed to *A.* and his heirs, to the use, intent, and purpose, that *B.* and his heirs may receive a rent, the declaration that *B.* and his heirs shall stand seized of the rent, to the use of *C.* for life, with remainders over; the rent is executed in *B.*, and then *C.* and the remainder-men take only the trust of the rent. If the estate be conveyed to *A.* and his heirs, to the use that *B.* may receive a rent for life; and after his decease, to the use that his first and other sons successively, and the heirs of their respective bodies, may receive the rent; these, it may be contended, are distinct rents; and therefore the rent to the second son may be considered too remote, as being a new rent limited to take effect after an indefinite failure of the issue of the first son. Objections also may be made to recoveries suffered by the father and son, as the tenant to the præcipe being made by the father he will not be seized of that rent, in which the son's entail subsists. The way therefore to limit the rent is, to grant a rent to a stranger and his heirs, that he may re-grant it to the intended uses.

VIII. The remaining subject for observation is, *WHAT USES ARE NOT EXECUTED BY THE STATUTE*.

VIII. 1. As to *uses created by wills*, it is to be observed, that lands were not devisable in common law, otherwise than by local customs of particular places, except through the medium of a previous feoffment to uses. The *cestuy que trust* might dispose of the use by will: the court of chancery considered the will as a declaration of the use, and compelled the feoffees to convey the lands accordingly. But, when by the statute of the 27th Henry VIII. the possession was annexed to the use, as the use thereby became merged in the land, this indirect power of devising lands was absolutely lost. The 32 and 34 Hen. VIII. gave a power to devise the whole of lands held in socage, and two-thirds of land held by knight's service. The 12 Car. II. converted knight's service into socage; and thus, all landed property, except that which is of the tenure of copyhold, became devisable. But, as the statute of Uses preceded the statute of Wills, it does not necessarily extend to them. It is true, that the statute of Uses speaks of persons seized to uses by virtue of wills: but this must apply either to those lands, which were devisable by custom;—as, when a person seized of lands devisable by custom, devised them to *A.* and his heirs, to the use of *B.* and his heirs:—or to uses at common law:—as where a feoffment was made to *A.* and his heirs, to the use of *B.* and his heirs, and *B.* devised the use. To uses of this description the statute extended; but it is difficult to conceive how uses created under the testamentary power given by the statutes of Wills can be within the statute of Uses. It is said, that though the law will not force the operation of the statute of Uses upon devises to which it is the testator's intention it should not extend; yet it will apply it to those cases to which it is his intention it should extend. This opinion makes it depend entirely on the will of the testator, whether the statute of Uses shall or shall not operate upon the devises of his will. Thus, if a devise is made to the use of *A.* for life, with remainders over, if it were to be considered as a limitation under the statute of Uses, it would be void, for want of a seisin to serve the uses. It cannot therefore be the testator's intention that it should operate under that statute; consequently the law will not force it under that statute, but leave it solely to its effect under the statutes of Wills. But, suppose a devise to *A.* and his heirs, to the use of *B.* and his heirs, that would be good to give the legal fee to *B.* as a limitation under the statute of Uses. The testator therefore might intend, and the form of the devise shows he did intend, to raise an use under that statute, and the law, in conformity to his intentions, extends its operation to the devise. But, against this it may be argued, that a statute can never be considered as

relating to any thing which did not exist at the time of its passing; and therefore, as lands were not devisable till some years after the statute of Uses, the statute of Uses cannot extend to uses created by devise: that in wills the testator's intention is chiefly considered; and as by a devise to *A.* and his heirs, to the use of *B.* and his heirs, the testator shows it to be his intention that *B.* should have the legal fee, the law will put that construction on the devise, and give it that operation. At the end of Mr. Hillyard's edition of Sheppard's Touchstone, there is a very learned opinion of the late Mr. Booth on the doctrine of uses. In two copies which the editor has seen of this opinion, made immediately under the eye of Mr. Booth, and delivered by him to the persons in whose custody they now are, and also in a copy of it bequeathed by Mr. Booth, with other valuable law manuscripts, to Mr. Holliday, the following note is added to it:—"P. S. Powers under wills are not like powers under conveyances operating by way of use. The execution of a power under a devise, is not the limitation of a use; no, not where the devise is to uses: as where there is a devise to *I. S.* and his heirs, to the use of *A.* for life, remainder to *B.* in tail, with power for *A.* to limit a jointure, or lease, or charge; here there will be no seisin in *I. S.* consequently no such use in *A.* or *B.* as is executed by the statute of Uses; consequently, the execution of the power is no use; it operates as a devise under the statute of Wills."—See *Popham v. Bampffield*, 1 Vern. 79. *Burchett v. Durdant*, 2 Vent. 312. *Broughton v. Langley*, 2 Salk. 679. *Gilb. Uses*, 281.—But whether a devise to uses operates solely by the statute of Wills, or by that statute jointly with the statute of Uses, is, except where the devisee to uses dies in the life-time of the testator, rather a matter of speculation than of use; as it is now settled, that an immediate devise to uses, without a seisin to serve those uses, is good; and that where the estate is devised to one for the benefit of another, the courts execute the use in the first or second devisee, as appears to suit best with the intention of the testator.

VIII. 2. *With respect to copyhold estates*, the statute of Uses does not extend to them, as it is against the nature of a copyhold tenure, that any person should be introduced into the estate without the consent of the lord. *Gilbert's Tenures*, 170.

VIII. 3. *With respect to leases for years*;—these estates are not executed by the statute. But this must be understood of leases actually in existence, at the time of their being assigned to the use. Therefore, if *A.* possessed of a lease for years, grants it over, or assigns it, to *B.* and *C.* to the use of *D.*; all the estate is in *B.* and *C.*, and *D.* takes only a trust, or an equitable estate. But if *A.* being seised of lands in fee, makes a feoffment to the use of *B.* and *C.* for a term of years, this term is served out of the seisin of the feoffee, and is executed by the statute.—It is the same if he bargains and sells the estate, of which he is seised in fee, for a term of years. *Gilb. Uses*, 198. *Dyer*, 369. 2 *Inst.* 671.

Such are the general outlines of the doctrine of uses; one of the most important parts of the law, as all the landed property of the kingdom is, either directly or indirectly, regulated by it. It is to be observed, that one of the chief objects, both of the legislature and the judicature of this kingdom, in their regulations upon this subject, has been, on the one hand, to guard against those restraints upon alienation, which are incompatible with the welfare of a free and commercial country; and on the other, to admit of reasonable settlements and provisions being made for wives and children, and the general wants of families. Experience seems to show that they have accomplished their object. This fully answers the objections which foreigners make to the nature of our family settlements, that we exclude the ancestor, whose character is known to us, from the disposal of the property; and intrust it to the children, with whom we must be perfectly unacquainted. So detrimental has an unqualified and unlimited power of settlement been found even in France, that it was, under the *ancien regime*, a question there, whether it would not be for the advantage of the nation at large, that all settlements and trusts should be abrogated. This question, so far as it related to moveables, was by the order of Louis XV. proposed in the year 1744 by the Chancellor D'Aguesseau to all the parliaments and superior councils of France. See *Questions concernant les Substitutions, avec les Responses de tous les Parlemens et Cours Souveraines du Royaume, et les Observations de M. le Chancelier D'Aguesseau sur les dits Responses*. Toulouse, 1770. And see also *Commentaire de l'Ordonnance de Louis XV. sur les Substitutions, par Mons. Furgole*. Paris, 1767.

It is hoped, that the importance of the subject will be thought a sufficient apology for the great length of the foregoing note. Lord Chief Baron Gilbert's Essay upon Uses and Trusts, considered in the only light in which it can be considered with justice to its author, as an unfinished sketch, is entitled to great commendation; it certainly contains several most profound and learned observations, but in many instances is very defective and erroneous. Its intrinsic value is greatly increased, by Mr. Sugden's recent edition of it. The want of a comprehensive and systematic treatise upon uses which was mentioned in a former edition of this note, is now supplied by Mr. Sander's *Essay on Uses and Trusts*. The account given in that work of the Doctrine of Uses, as it stood before the stat. of 27 H. 8. particularly interesting. The doctrine of Powers is exhausted by Mr. Sugden's treatise on them. Had the public been in possession of these works before this annotation was fitted to them, it would not have been attempted.—[Butler, note 231.]

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	4	i.	746	57		9	i.	757	91
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	2	i.	747	59		11	i.	732	12
	3	i.	747	60		12	i.	732	13
	4	i.	747	61		13	i.	732	14
	5	i.	748	63	188 b	n 1	i.	759	3
	6	i.	748	64		2	i.	759	4
	7	i.	749	65		3	i.	758	1
185 a	n 1	i.	749	66	189 a	n 1	i.	758	2
	2	i.	749	67		2	i.	509	34
	3	i.	749	68		3	i.	759	5
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	5	i.	750	70		5	i.	759	6
	6	i.	750	71	189 b	n 1	i.	759	8
	7	i.	750	72		2	i.	769	35
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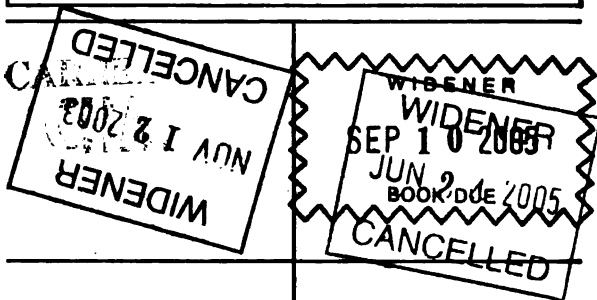




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